(9) (7)

**Nos. 85-1658 and 85-1660**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986



FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

*Appellants,*

v.

FLORIDA POWER CORPORATION, *et al.*,

*Appellees.*

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GROUP W CABLE, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., and COX CABLEVISION CORPORATION,

*Appellants,*

v.

FLORIDA POWER CORPORATION, *et al.*,

*Appellees.*

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**On Appeal from the United States Court of Appeals for the Eleventh Circuit**

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## JOINT APPENDIX

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**Jurisdictional Statements Filed April 9, 1986**
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## TABLE OF CONTENTS

Items Reprinted in Appendix to Jurisdictional Statement of United States of America and Federal Communications Commission (hereinafter Govt.) and Appendix to Jurisdictional Statement of Group W Cable, Inc., *et al.* (hereinafter Group W):

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**Nos. 84-3683, 84-3904**

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**Docket Entries**

| | |
|---|---|
| 10-9-84 | Petition for Review of FCC Order filed in No. 84-3683 |
| * * * | |
| 11-29-84 | Respondent FCC filed Certified List of Items in Record in No. 84-3683 |
| 12-10-84 | Respondent FCC Motion to file corrected certified list filed and granted in No. 84-3683 |
| * * * | |
| 12-13-84 | Appellant Florida Power Corp. brief filed in No. 84-3683 |
| 12-31-84 | Petition for Review of FCC Order filed in No. 84-3904 |
| 1-2-85 | Intervenors' Tampa Electric Co., Mississippi Power and Light Co., and Alabama Power Co. brief filed in No 84-3683 |
| 1-11-85 | Record Excerpts filed in No. 84-3683 |
| * * * | |
| 1-30-85 | Order Consolidating Nos. 84-3683 and 84-3904 |
| * * * | |

| | |
|---|---|
| 2-11-85 | Certified List of Items filed in No. 84-3904 |
| * * * | |
| 2-19-85 | Intervenors National Cable Television Ass'n, Cox Cablevision Corp., Group W Cable, Inc. brief filed |
| 2-22-85 | Appellee Brief filed |
| * * * | |
| 3-7-85 | Record on Appeal filed |
| 3-8-85 | Intervenors Tampa Electric Co., Mississippi Power and Light Co. and Alabama Power Co. Reply Brief filed |
| 3-15-85 | Appellant Florida Power Corp. Reply Brief filed |
| 6-3-85 | Oral Argument Scheduled |
| 6-26-85 | Case Argued Before Roney, Fay, Dumbauld, JJ. |
| * * * | |
| 9-27-85 | Supplemental Authority filed |
| 10-8-85 | Opinion Rendered and Judgment Entered Vacating FCC Orders |
| 10-28-85 | Petition for Rehearing and Rehearing En Banc of Group W Cable, Inc. National Cable Television Ass'n, Cox Cablevision Corp., and appellee FCC filed |
| 11-12-85 | Order denying Rehearing and Rehearing En Banc |
| * * * | |
| 11-21-85 | Judgment Issued as Mandate |
| 11-22-85 | Record on Appeal Returned to Clerk |



| | |
|---|---|
| 12-10-85 | Respondents FCC and United States Notice of Appeal to Supreme Court filed |
| 12-10-85 | Intervenors Group W Cable Inc., National Cable Television Ass'n, and Cox Cablevision Corp. Notice of Appeal to Supreme Court filed |

**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**

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**File Nos. PA-81-0008, PA-81-0023, PA-82-0005**

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**Docket Entries**

**File No. PA-81-0008**

| | |
|---|---|
| 11-18-80 | Complaint of Teleprompter Corporation |
| 1-21-81 | Response of Florida Power Corporation |
| 2-10-81 | Reply |
| * * * | |
| 7-16-81 | Memorandum Opinion and Order granting complaint |
| 8-11-81 | Application for Review |
| 8-11-81 | Request for Stay, filed by Florida Power Corporation |
| * * * | |
| 11-16-81 | Memorandum Opinion and Order denying stay |
| * * * | |
| 9-28-84 | Memorandum Opinion and Order denying application for review |

**File No. PA-81-0023**

| | |
|---|---|
| 2-20-81 | Complaint of Acton CATV, Inc. |
| 3-23-81 | Response of Florida Power Corporation |



| | |
|---|---|
| 4-13-81 | Reply |
| 7-16-81 | Memorandum Opinion and Order granting complaint |
| 8-11-81 | Application for Review of Florida Power Corporation |
| 8-11-81 | Request for Stay |
| * * * | |
| 11-16-81 | Memorandum Opinion and Order denying stay |
| * * * | |
| 9-28-84 | Memorandum Opinion and Order denying applications for review |

**File No. PA-82-0005**

| | |
|---|---|
| 11-2-81 | Complaint of Cox Cablevision Corporation |
| 12-2-81 | Response of Florida Power Corporation |
| 12-31-81 | Reply |
| 3-8-82 | Memorandum Opinion and Order granting complaint |
| 4-7-82 | Application for Review |
| * * * | |
| 9-28-84 | Memorandum Opinion and Order denying review |

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D. C.**

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**File No. PA-81-0008**

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In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC.
*Complainants,*

v.

FLORIDA POWER CORPORATION
*Respondent.*

TO: The Common Carrier Bureau

## COMPLAINT

### Parties

1. Complainants Teleprompter Corporation and Teleprompter Southeast, Inc., own and operate cable television systems presently serving the communities of DeLand, Groveland, Haines City, Mascotte, New Port Richey, St. Petersburg and Winter Garden, Florida. The address of Teleprompter Corporation's headquarters is 888 Seventh Avenue, New York, New York 10019. Teleprompter Southeast, Inc.'s address is 888 Seventh Avenue, New York, New York 10019.

2. Respondent Florida Power Corporation is engaged in the provision of electric service in portions of the State of Florida. Respondent's general office address is 3201 34th Street South, St. Petersburg, Florida 33711.



### Jurisdiction

3. This Commission has jurisdiction over this complaint and over Respondent under the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, including, but not limited to, Section 224 thereof.

4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainants allege, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainants allege, upon information and belief, and in reliance upon lists published by the Commission pursuant of 47 C.F.R. § 1.1414(b), that neither the State of Florida, nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulates the rates, terms, or conditions of pole attachments. The Florida Supreme Court has held that attempts by the Florida Public Service Commission to regulate pole attachments exceeded the Commission's jurisdiction. *Teleprompter Corporation v. Hawkins*, No. 56,291 (Fla., May 29, 1980).

### Service

6. Attached hereto is a certificate of service on the Respondent and each federal, state, and local agency which regulates any aspect of service provided by Respondent.

### Agreement

7. Complainants have entered into an agreement with Respondent by which agreement and subsequent amendments it was agreed that space would be made available on Respondent's poles in and in the vicinity of DeLand, Groveland, Haines City, Mascotte, New Port Richey, St. Petersburg, and Winter Garden, Florida. for pole attachments as defined in 47 C.F.R. § 1.1402(b). That agreement,

dated July 1, 1977, and subsequent amendments dated February 20, 1979 and June 18, 1979, are attached hereto as Exhibit A. Pursuant to the agreement, Complainants are charged an annual rental rate of $5.50 per pole for the year ending December 31, 1977, $5.74 per pole for 1978, $5.98 per pole for 1979, $6.24 per pole for 1980, $6.51 per pole for 1981, and $6.79 per pole for 1982 (Exhibit A at § 7.1). As of the close of 1979, there were 54,380 Florida poles subject to the Agreement.

**Unjust and Unreasonable Rate**

8. Respondent is thus currently attempting to charge Complainants an annual rental of $6.24 per pole in areas presently served. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Communications Act and Section 1.1409(c) of the Commission's Rules and Regulations, the maximum lawful rate Respondent may charge is $1.38.

9. In order to determine the lawfulness of Respondent's rate, Complainants requested data from Respondent justifying its rate, by letter dated June 2, 1980. Exhibit B. No response has been received.

10. By statute, the maximum lawful rate is determined by multiplying the "revenue requirement" of each pole (*i.e.*, the operating expenses and capital costs attributed to each bare pole installed) by the "use ratio" for cable television (*i.e.*, the percentage of total useable space occupied by the pole attachment).

11. Some of the information contained in publicly available documents, such as Respondent's Federal Energy Regulatory Commission ("FERC") Form 1, is sufficient to compute certain elements by which the maximum lawful rate is calculated. However, Respondent's failure to provide the information required under 47 C.F.R. §§ 1.1401-1.1415 compels Complainants to rely in part upon reasonable assumptions and upon information publicly available.



As indicated in Exhibit C, Respondent claims a gross investment in pole plant, including poles, cross arms, and all appurtenant equipment, whether or not used or useful for attachment in television cables, of $81,841,613. Subtracting a depreciation reserve of 20.3% (the ratio of the depreciation reserve for total plant to the gross investment in total plant) yields a net investment of $65,227,766. Reducing that figure to remove the 15% net investment (gross investment less depreciation reserve) in cross arms and other equipment not useful in pole attachments yields a net investment of $55,443,601. That figure must be divided by the number of poles owned by Respondent to determine net investment for bare poles. Because the total number of poles owned by Respondent is not available from public documents, and has not been disclosed by Respondent, it may be presumed that a reasonable estimate may be used. 47 C.F.R. § 1.1409(a); Second Report and Order in CC Docket 78-1404, 72 F.C.C.2d 59, 68-69 (1979); *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia*, No. 80-372, ¶ 9 (F.C.C., July 16, 1980). Because Respondent has refused to provide a more accurate or reliable estimate of its net investment per bare pole, it may be presumed that its net investment per bare pole is no greater than its geographic neighbor, General Telephone Company of Florida, and is $57.18. Exhibit C.

12. In order to calculate the revenue requirement per pole, the net investment per pole must be multiplied by an annual carrying charge, which consists of all operating expenses and capital costs properly attributable to such poles. Both the Congress and the Commission have determined that the carrying charge is comprised of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital. S. Rep. No. 95-580, 95th Cong. 1st Sess. 20 (1977); *Teleprompter of Fairmont, supra.* Based on information available in Respondent's FERC Form 1, the carrying charges attributable to maintenance

expenses, administrative expense, and taxes may be calculated as 12.4%, 1.4%, and 4.6% respectively. Exhibit C. Because Respondent has failed to provide information on its depreciation, and the rate of depreciation is not calculable from publicly available information, Complainants can only assume that Respondent's experience with its poles is comparable to that of similarly situated utilities. Assuming that the useful life of a utility pole is 30 years, then the rate of depreciation, as adjusted for application to net investment, is 4.1%. *Id.* Similarly, because Respondent has not provided information on its actual cost of capital, Complainants can only assume that Respondent's cost of capital is in the reasonable range of 10%. Thus, the annual carrying charge is approximated at 32.5%. Multiplying the net investment per bare pole, $57.18, by the annual carrying charge, 32.5%, yields a revenue requirement per pole of $18.58.

13. In order to determine what share of that revenue requirement the Respondent may charge to cable systems, it is necessary to determine two factors: the space used for cable attachments and the average useable space per pole.

14. As the Commission has found, there is no dispute that CATV cable actually uses or occupies one foot of space. *See, e.g., Teleprompter of Fairmont, supra.* No safety zones or other clearances may properly be assigned to the cable operator.

15. Respondent has failed to provide any information on its average pole height. Accordingly, Complainants may make the reasonable assumption that Respondent's pole height and average useable space is in accordance with the Commission's estimate: 13.5 feet of useable space per pole. *Id.*

16. Dividing the space occupied by the cable attachment, one foot, by the total useable space, 13.5 feet, yields a use ratio of 7.41%. In other words, Complainants use



7.41% of the useable space on each of the Respondent's poles.

17. Therefore, multiplying the revenue requirement per pole, $18.58, by the use ratio, 7.41%, yields the maximum lawful rate, $1.38. Exhibit C. Pursuant to 47 U.S.C. § 224(d)(1), that rate is the maximum just and reasonable rate. Any rate charged by Respondent in excess thereof is unjust and unreasonable and therefore unlawful.

18. As set forth above, and as reflected in the pole agreement attached as Exhibit A, Respondent presently charges a rate of $6.24. Complainants submit that such a rate is unlawful in that it exceeds the calculated maximum lawful rate of $1.38.

**Anchor Attachments**

19. By February 20, 1979 amendment to the agreement, Respondent is attempting to charge complainant a "one-time rental charge" of $16.50 per anchor attachment. Exhibit A. Complainants submit that this charge is unlawful. Respondent must support any such charge by the same cost justification as prescribed for pole attachments. Moreover, if anchor attachments are to be charged separately, then Respondent's investment in anchors must be removed from the net investment in poles used to calculate the maximum pole attachment charge, to avoid double counting. The pole investment figure above includes amounts invested in anchors. Should anchors be accounted for separately, the pole investment figure would be reduced by anchor investment, thereby reducing the maximum legal rate for the pole attachments.

**Unreasonable Terms and Conditions**

20. Respondent also has attempted to impose unreasonable and illegal terms and conditions on Complainants in Respondent's pole attachment agreement. First, the agreement requires increasing rentals annually. Attachment Agreement, Exhibit A, § 7.1. Complainants submit that no

rate increases may be permitted except when fully justified on the basis of costs under the rate-making methodology set forth in the Commission's rules. Second, the agreement requires a semiannual payment of $1,750.00 "[i]n exchange for a waiver of bond coverage for this agreement." *Id.* This payment to avoid a bonding requirement is onerous and unnecessary, because a bonding requirement is unnecessary: Complainants are established and reliable corporations. Moreover, a bond is unnecessary because the semiannual payments under the agreement must be made in advance.

**Relief Requested**

21. Complainants respectfully request that:

1. the Commission determine that the maximum rate Respondent may lawfully charge is $1.38 per pole per year;

2. the present rates, being in excess thereof, be terminated pursuant to 47 C.R.F. § 1.1410(a);

3. the Commission declare that Respondent's anchor attachment charge is unreasonable and unlawful unless supported by cost justification, and that if such separate charge is to be made the pole attachment charge must be reduced accordingly;

4. the Commission declare that Respondent's payment in lieu of bond requirement is unreasonable and unlawful, and that no increases in the rate above $1.38 per pole may be made unless based directly on changes in the information described in 47 C.F.R. § 1.404(g);

5. the Commission, pursuant to 47 C.F.R. § 1.1410(b), substitute an annual rate of $1.38 per pole in the agreement attached hereto as Exhibit A;

6. Respondent be ordered, pursuant to 47 C.F.R. § 1.1410(c) to refund to Complainants the amounts Complainants have paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.



Respectfully submitted,

TELEPROMPTER CORPORATION
TELEPROMPTER SOUTHEAST, INC.

By /s/ Gardner F. Gillespie
Gardner F. Gillespie

By /s/ Mark S. McConnell
Mark S. McConnell

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Dated: November 18, 1980

Their Attorneys

## AFFIDAVIT

STATE OF NEW YORK )
SS:
COUNTY OF NEW YORK)

I, Barry P. Simon, an officer of Teleprompter Corporation, on oath do state that I have read the foregoing Complaint attached hereto; that I am familiar with the matters contained therein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

/s/ Barry P. Simon
Barry P. Simon

Subscribed and Sworn to before me
this *4th* day of *November*, 1980

/s/ Claire Feldman [Seal]
Notary Public

My Commission Expires: March 30, 1982



## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Complaint" have been mailed, postage prepaid, this 18th day of November, 1980, to the following:

Florida Power Corporation A-5
Legal Department
3201 34th Street South
St. Petersburg, Florida 33711

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Lillian R. Nelson

## LIST OF EXHIBITS





## EXHIBIT A

*Pole Attachment Agreement and Amendments*

# ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC.

*Section 0.1* THIS AGREEMENT, made and entered into this 1st day of July, 1977, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and TELEPROMPTER CORPORATION, organized and existing under the laws of the State of New York, and TELEPROMPTER SOUTHEAST, INC., organized and existing under the laws of the State of Alabama, herein collectively referred to as the "Television Company".

**WITNESSETH:**

*Section 0.2* WHEREAS, the Television Company proposes to furnish cable television distribution service in the areas described in Schedule "I" attached hereto and made a part hereof by reference, and Television Company will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

*Section 0.3* WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

*Section 0.4* NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto mutually covenant and agree as follows:



## ARTICLE I

## SCOPE OF AGREEMENT

*Section 1.1* The Electric Company, subject to the provisions of this agreement, grants the Television Company a license to attach CATV cables, wires and appliances to its poles. This agreement shall be in effect only in the areas described in Section 0.2 above in which the Electric Company provides electric distribution service.

*Section 1.2* The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

*Section 1.3* Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

## ARTICLE II

## PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

*Section 2.1* Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefor in the form of Exhibit A, attached hereto and made a part hereof.

Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in Exhibit A.

*Section 2.2* The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the non-betterment expense thereby incurred. Nothing in this section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

*Section 2.3* The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National



Electrical Safety Code, or any amendments or revisions of said specifications or code.

*Section 2.4* In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and estimated cost (based upon Electric Company's standard unit costs with no provision for a profit) thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated cost (based upon Electric Company's standard unit costs with no provision for a profit) incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any actual expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close

proximity to the Electric Company's facilities. The Television Company may, however, request the Electric Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost (based upon Electric Company's standard unit costs with no provision for a profit) of setting such pole or poles.

*Section 2.5* The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

*Section 2.6* The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.



## ARTICLE III

## EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

*Section 3.1* Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communications Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

## ARTICLE IV

## RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

*Section 4.1* It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30)

days' notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

## ARTICLE V

## INSPECTION

*Section 5.1* The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections of the entire plant of the Television Company; and the Television Company, shall on demand, reimburse the Electric Company for one-half of the actual expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

*Section 5.2* Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.



## ARTICLE VI

## ABANDONMENT AND REMOVAL OF ATTACHMENTS

*Section 6.1* The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

*Section 6.2* Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and then within thirty (30) days the cables, wires, and appliances of the Television Company shall be removed from the affected pole or poles. The effect of such notice shall be suspended, if the Television Company shall within thirty (30) days from the receipt thereof, commence and expeditiously prosecute a legal action to secure a legal determination of its right and authority to maintain its facilities on the affected poles. Upon final disposition of such legal action, Television Company shall remove its facilities should the judicial determination be adverse to the Television Company's right to maintain its facilities on the effected poles.

## ARTICLE VII

## RENTAL AND PROCEDURE FOR PAYMENTS

*Section 7.1* The Television Company shall pay to the Electric Company, for attachments made to poles under this agreement, a rental at the rate of Five Dollars and Fifty Cents ($5.50) per pole per year for the period from July 1, 1977 to December 31, 1977. The annual rate per pole

shall be for the next succeeding five-year period as follows: for the year 1978 the sum of $5.74 per pole; for the year 1979 the sum of $5.98 per pole; for the year 1980 the sum of $6.24 per pole; for the year 1981 the sum of $6.51 per pole; and for the year ending December 31, 1982 the sum of $6.79 per pole. Said rentals shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semiannual payments and shall include all attachments made pursuant to prior agreement with Television Company's subsidiaries or their assignees or predecessors. The first payment of rental hereunder shall include such amount as is due for the use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective. In exchange for a waiver of bond coverage for this agreement, Television Company shall pay Electric Company the sum of $1,750.00 at the time each semiannual payment is due hereunder.

## ARTICLE VIII

## PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

*Section 8.1* At the expiration of five and one-half (5 1/2) years from the date of this agreement and at the end of every three (3) year period thereafter, the rate per attachment per pole shall be subject to revision at the request of either party made in writing to the other not later than sixty (60) days before the end of any such period. If, within sixty (60) days after the receipt of such request by either party from the other, the parties hereto fail to agree upon a revision of such rate, the then ad-



justment rate per pole to be paid during the next three (3) year period on which the Television Company has attachments shall be (i) the current rate per pole in effect for the then current period, or (ii) an amount equal to one-half of the current annual cost of installing and maintaining a 35-foot pole, whichever amount is higher. In case of a revision of the adjustment rate as herein provided, the new rate shall be applicable until again revised.*

## ARTICLE IX

## DEFAULTS

*Section 9.1* If the Television Company shall fail to comply with any provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles, and if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles as to which default or non-compliance shall have occurred. In case of such termination, no refund of prepaid rentals shall be made.

## ARTICLE X

## LIABILITY AND INSURANCE

*Section 10.1* The Television Company shall assume full responsibility for the attachment of its facilities pursuant to

*Notwithstanding the foregoing, subsequent to the expiration of the initial five and one-half (5 1/2) year period referred to above, the rate established by this agreement shall be subject to controlling governmental regulation, state or federal, if any.

this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence, the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, initial disposition of injured or deceased person.

*Section 10.2* As a safeguard in respect to Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $200,000 each person and $500,000 each occurrence and with Property Damage limits not less than $50,000 each occurrence and $100,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $200,000 each person and $500,000 each occurrence and with Property Damage limits not less than $50,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of



and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form ADM-SERV-ICS-17C(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.

*Section 10.3* The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company if [*sic*] further hereby advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and safety measures to be taken in connection therewith; and, during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees of the general public against all hazardous or dangerous conditions as the same arise.

*Section 10.4* The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors

shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place of work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-energization of such conductors or other equipment, and without making any changes whatsoever at the job site.

## ARTICLE XI
## EXISTING RIGHTS OF OTHER PARTIES

*Section 11.1* Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement -and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto.

## ARTICLE XII
## TERM OF AGREEMENT

*Section 12.1* This agreement shall become effective upon its execution and if not terminated in accordance with the pro-



visions with the provisions [*sic*] of Section 9.1 shall continue in effect from a term of not less than five and one-half (5 1/2) years. Either party may terminate the agreement at the end of said period at any time thereafter by giving to the other party at least six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

## ARTICLE XIII
## ASSIGNMENT OF RIGHTS

*Section 13.1* The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

*Section 13.2* No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a conditional license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right, which right is limited specifically to those circumstances set forth in this agreement and including those described in Sections 0.3 and 1.2, to deny licensing of any poles to the Television Company.

## ARTICLE XIV

## WAIVER OF TERMS OR CONDITIONS

*Section 14.1* Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

## ARTICLE XV

## BONDING TO ELECTRIC COMPANY GROUND

*Section 15.1* For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

*15.1.1* "Verticle [*sic*] ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

*15.1.2* "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

*15.1.3* "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

*Section 15.2* At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists.



Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.

*Section 15.3* Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

*Section 15.4* The Electric Company reserves the right to install a "bonding wire" to any piece of television equipment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

*Section 15.5* It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

## ARTICLE XVI

## AUTOMATIC TERMINATION

*Section 16.1* In the event the Television Company shall suffer, in a portion of the area described in Section 0.2 of this agreement, the expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect, then this agreement may, at the option of the Electric Company, upon written notice, be terminated with respect to such affected areas. The effect of such notice shall be suspended, if the Television Company shall within thirty (30) days from the receipt thereof, com-

mence and expeditiously prosecute a legal action to secure a legal determination of its right and authority to maintain its facilities on the effected poles. Upon final disposition of such legal action, Television Company shall remove its facilities should the judicial determination be adverse to the Television Company's right to maintain its facilities on the effected poles.

## ARTICLE XVII

## REPRESENTATIONS AND WARRANTIES

*Section 17.1* Television Company represents and warrants that with respect to the area described in Section 0.2 of this agreement, Teleprompter Corporation or Teleprompter Southeast, Inc. now holds all current franchises which were previously held by various subsidiaries of Teleprompter, Inc. In the event that such is not the case, Television Company shall cause any subsidiary holding a franchise within the area described in Section 0.2 to execute and be bound by the terms of this agreement.

## ARTICLE XVIII

## MISCELLANEOUS PROVISIONS

*Section 18.1* Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

*Section 18.2* Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States,



which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

*Section 18.3* Time. Time is of the essence of this agreement.

*Section 18.4* Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

*Section 18.5* Binding Effect. Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized to become effective as of the day, month and year first above written.

| | |
|---|---|
| (corporate seal) | FLORIDA POWER CORPORATION |
| Attest: /s/ Betty M. Clayton<br>Secretary | By /s/ Ned B. Sparke<br>Secretary |
| (corporate seal) | TELEPROMPTER CORPORATION |
| Attest: /s/ Barry P. Harmon<br>Ass't. Secretary | By /s/ Richard M. Sykes<br>Secretary |
| (corporate seal) | TELEPROMPTER SOUTHEAST, INC. |
| Attest: /s/ Barry P. Hamon<br>Secretary | By /s/ Richard M. Sykes |

## EXHIBIT A

## ATTACHMENT RENTAL CONTRACT

## AND
## FLORIDA POWER CORPORATION
### Application and Permit

_____, 19____

_____

In accordance with the terms of agreement dated ___, 19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s _____. Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit", shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By _____

Title _____

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $ _____, payable in advance.

Permit denied under Section 13.2, _____, 19 ____.

The above changes and rearrangements approved ____, 19 ____, and advance payment therefor enclosed.

By _____



Title _____

Permit Approved ___, 19 _ By _____

Permit No. _____
Total Previous Attachments

Attachments This Permit __ Title _____
New Total _____

## ATTACHMENT RENTAL CONTRACT
## AND
## FLORIDA POWER CORPORATION
### Notification of Removal by Television Company

_____, 19____

_____

In accordance with the terms of the agreement dated _____, 19____, kindly cancel from your records the following poles covered by Permit No. _____, from which attachments were removed on _____, 19____.

Location: City _____ County _____, Florida.

| Pole Number | Permit No. | Pole Location |
|---|---|---|

By _____

Title _____

Notice Acknowledged By _____

_____, 19____ Title _____

Notice No. _____

Total Poles Discontinued This Notice _____

Poles Previously Vacated _____

Total Poles Vacated To Date _____



## SCHEDULE "I"

1. March 1, 1972—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—service in Town of Belleair Bluffs, Town of Belleair Beach, Town of Indian Rocks Beach, Town of Indian Rocks Beach South Shore, City of Largo and City of Seminole, Florida.

2. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in the City of Clermont, Florida.

3. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in City of Minneola, Florida.

4. July 8, 1974—between Florida Power Corporation and Teleprompter of Florida, Inc.—service in City of Oakland, Florida.

5. May 27, 1971—between Florida Power Corporation and Teleprompter Corporation—service in City of Treasure Island, Florida.

6. March 15, 1972—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—Town of Safety Harbor, Florida.

7. January 4, 1971—between Florida Power Corporation and Teleprompter Gulf Coast CATV Corporation—service in City of St. Petersburg Beach, City of Gulfport and Town of South Pasadena, Florida.

8. September 1, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service in New Port Richey, Florida and the unincorporated areas of Pasco County in the West Pasco marketing area, to include all sections in Twp. 26 S, Rges. 15 E, 16E, and 17 E; all sections in Twp. 25 S. Rge. 16 E, and 17 E; Secs. 21-28, and Secs. 33-36 (incl.) of Twp. 24 S, Rge. 16 E; Secs. 19-36 (incl.) of Twp. 24 S, Rge. 17 E.

9. May 19, 1971—between Florida Power Corporation and TM Communications Company of Florida—service in City of St. Petersburg, Florida.

10. March 6, 1972—between Florida Power Corporation and TM Communications Company of Florida—service in Haines City and the surrounding service area of Polk County and the incorporated areas of Lake Hamilton, Dundee, and Davenport.

11. October 20, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service within the unincorporated areas of Volusia County, Florida.

12. October 20, 1970—between Florida Power Corporation and The TM Communications Company of Florida—service in City of DeLand, Florida.

13. October 28, 1970—between Florida Power Corporation and TM Communications Company—service in City of Winter Garden, Florida.

14. October 28, 1970—between Florida Power Corporation and TM Communications Company—service in City of Ocoee, Florida.

15. March 30, 1973—between Florida Power Corporation and Teleprompter of Florida, Inc.—service within the unincorporated areas of Lake County, Florida (as described in Exhibit "A" of the basic franchise)

16. March 15, 1971—between Florida Power Corporation and the TM Communications Company of Florida—service in the unincorporated areas of Orange County, Florida, as indicated on the attached Florida Power Drawing No. 71108AP, dated 3/10/71.

17. October 30, 1972—between Florida Power Corporation and TM Communications Company—for service in Town of Orange City.

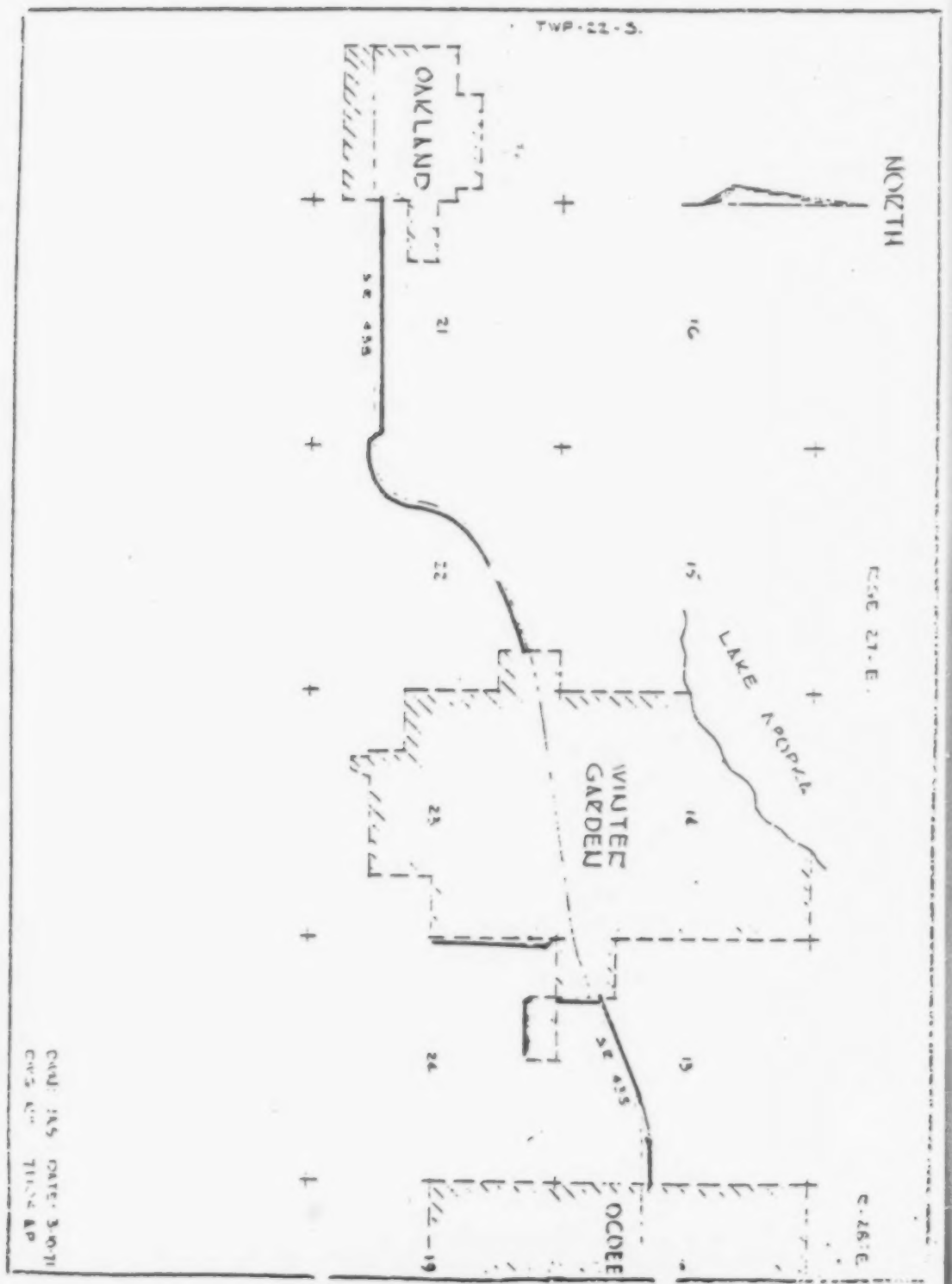


**Description of Lands to be Included**

All of the following lands lying in Lake County, Florida, excluding all areas within the city limits of all municipalities now incorporated by law:

1. Those lands lying in the southern portion of Lake County, Florida, in township 21, 22, 23 and 24 south.

2) Those lands lying in Lake County, Florida within the boundary lines as below described: Beginning at the intersection of the range line dividing ranges twenty-three and twenty-four east with the township line dividing townships twenty-four and twenty-five south; thence east on said township line to the range line dividing ranges twenty-four and twenty-five east; thence north on said range line to the section line dividing sections thirty and thirty one, in township twenty-four south; range twenty-five east; thence east on the north line of sections thirty-one, thirty-two, thirty-three and thirty-four in said township twenty-four south, range twenty-five east, to the northeast corner of said section thirty-four; Thence south on the east line of said section thirty-four to the township line dividing townships twenty-four and twenty-five south; thence east on said township line to the range line dividing ranges twenty-six and twenty-seven east; thence north on said range line to the township line dividing townships twenty and twenty-one south; thence west on said township line to the range line dividing ranges twenty-three and twenty-four east; thence south on said range line to the point of beginning.








# AMENDMENT AGREEMENT TO ATTACHMENT AGREEMENT BETWEEN TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC. AND FLORIDA POWER CORPORATION

THIS AMENDMENT AGREEMENT, made and entered into this 20th day of February, 1979, by and between FLORIDA POWER CORPORATION, a private corporation organized and existing under the laws of the State of Florida, hereinafter referred to as "ELECTRIC COMPANY", and Teleprompter Corporation, organized and existing under the laws of the State of New York, and Teleprompter Southeast, Inc., organized and existing under the laws of the State of Alabama, herein collectively referred to as the "TELEVISION COMPANY".

**WITNESSETH:**

WHEREAS, Electric Company and Television Company made and entered into a CONTRACT on the 1st day of July, 1977, providing the attachment of Television Company cables, wires and appliances to Electric Company poles; and

WHEREAS, the parties hereto are desirous of expanding the scope of said attachment agreement so as to permit the attachment of Television Company facilities to Electric Company anchors;

NOW, THEREFORE, in consideration of the above premises and of the mutual benefits from the covenants herein set forth, the parties hereto agree as follows:

1. That the term "Pole" or "Pole Line" shall be defined to include Electric Company screw anchors.

2. That Section 2.1 be revised to include the following additional wording: Before making any attachments to any anchor or anchors of the Electric Company, the Television Company shall make application and receive a permit, therefore, in the form of Exhibit C, attached hereto and made a part hereof.

   Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit C.

3. That Section 2.7 be added with the following wording:

   *Section 2.7* All anchor installations will be made in accordance with drawing marked 10-F, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, and is descriptive of the minimum required construction, and will be amended as related Electric Company specifications are changed.

4. That Section 7.2 be added with the following wording:

   *Section 7.2* The Television Company shall pay to the Electric Company, for attachments made to screw anchors under this Agreement, a one-time rental charge of $16.50 per anchor attachment. Said rental charge shall be paid in accordance with Section 5.2 and is nonrefundable, regardless of the period of time an anchor attachment exists. The aforementioned one-time rental charge for *anchor* attachments will be subject to revision in accordance with the terms set forth in Section 8.2.



5. That section 8.2 be added with the following wording:

   *Section 8.2* The one-time rental charge for Television Company attachments to Electric Company anchors shall be revised periodically to reflect one-half (1/2) the Electric Company's estimated average installed cost of a typical anchor installation. The Television Company shall be notified by letter of each rate change at least one (1) month prior to the effective date of each such rate change.

6. That Section 15.6 be added with the following wording:
   *Section 15.6* It shall be the Television Company's responsibility to bond its down guy(s) to the Electric Company down guy(s) attached to the same Electric Company pole.

7. Except as hereby amended, all the terms of said CONTRACT dated the first day of July ___, 1977, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have entered into this AMENDED AGREEMENT as of the day and year first above written.

*See attached provision marked "A":

| | |
|---|---|
| (Corporate Seal) | FLORIDA POWER CORPORATION |
| Attest: /s/ Betty M. Clayton<br>Ass't Secretary | By: /s/ Ned B. Sparke<br>Vice-President |
| (Corporate Seal) | TELEPROMPTER CORPORATION |

Attest: /s/ Claire Feldman
Ass't Secretary

By: /s/ Richard M. Sykes
Vice-President

(Corporate Seal)

TELEPROMPTER SOUTHEAST, INC.

Attest: /s/ Claire Feldman
Ass't Secretary

By: /s/ Richard M. Sykes
Vice-President

"A"

Execution and delivery of Agreement by the Licensee shall not constitute a waiver by Licensee of its right, if any, to challenge any of the terms of the Agreement pursuant to applicable Federal, State or locak [*sic*] laws and regulations, now or hereafter enacted or promulgated, with respect to Pole Attachment Agreements.



## EXHIBIT C

## ANCHOR ATTACHMENT RENTAL CONTRACT TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC. AND FLORIDA POWER CORPORATION

### Application and Permit

_____, 19____

_____

In accordance with the terms of agreement dated ____, 19____, application is hereby made for permit to make attachments to Florida Power Corporation anchors for installation of down guy facilities as indicated on the attached construction detail drawing/s number/s _____. Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit", shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

The maximum allowable conductor tension under light loading is _____ #.

By:_____

Title:_____

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $_____, payable in advance.

Permit denied under Section 13.2, _____, 19____.

The above changes and rearrangements approved _____ . 19____ and advance payment therefore enclosed.

By:_____

Title:_____

Permit Approved _____ , 19

Permit No. _____

Total Previous Attachments _____

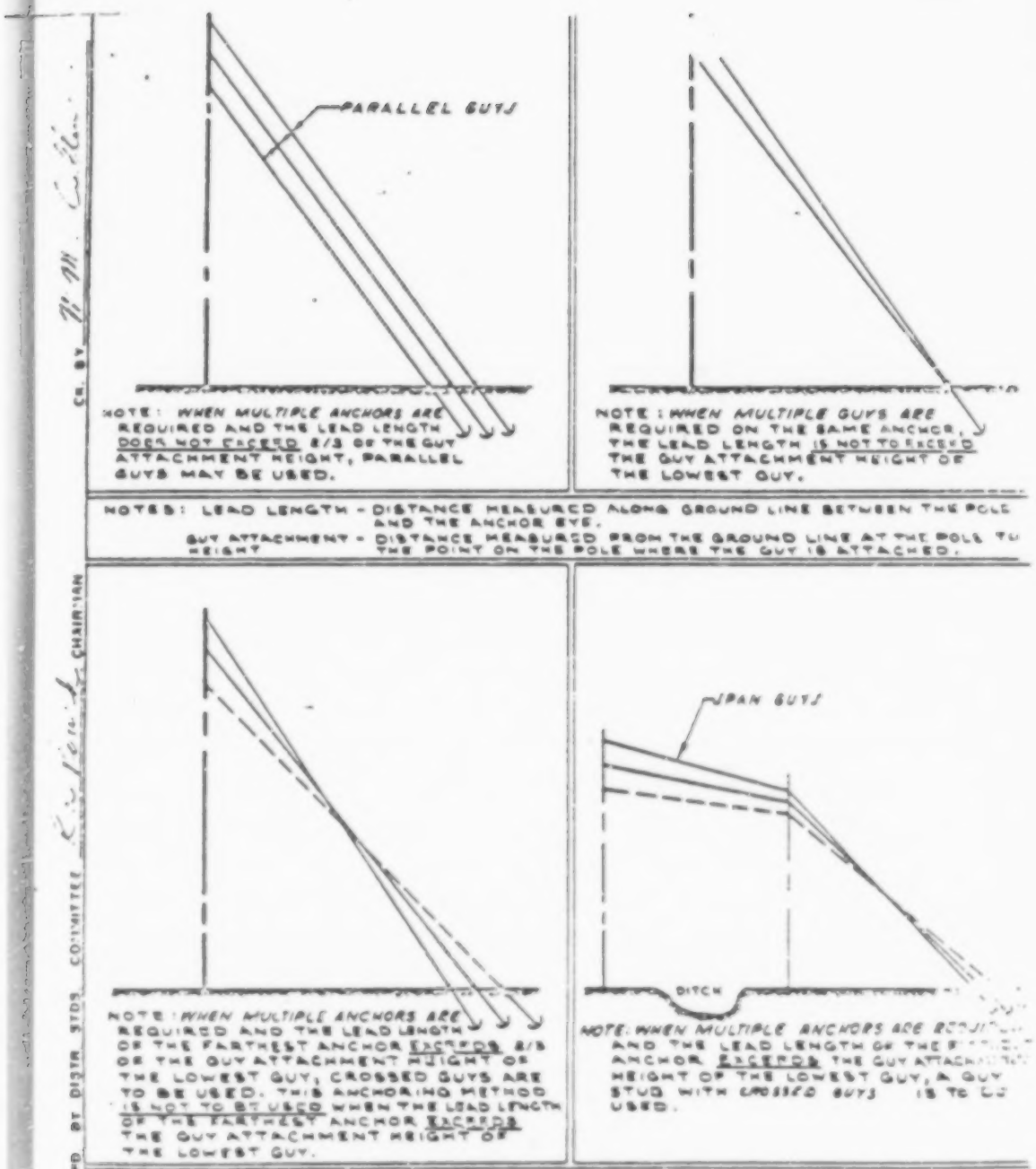
By:_____

Attachments This Permit _____

New Total _____

Title:_____






TYPICAL ANCHORING METHODS

## AMENDMENT TO ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND TELEPROMPTER CORPORATION AND TELEPROMPTER SOUTHEAST, INC.

THIS AGREEMENT, made and entered into this 18 day of June, 1979, by and between Florida Power Corporation, a Florida corporation, the Electric Company herein, and Teleprompter Corporation, a New York corporation, and Teleprompter Southeast, Inc., an Alabama corporation, collectively the Television Company herein.

### WITNESSETH:

WHEREAS, the patries [*sic*] have heretofore entered into an attachment agreement dated the 1st day of July, 1977, the Attachment Agreement herein, authorizing the Television Company to attach its facilities to the poles of the Electric Company in specified geographic areas described in Schedule "I" of the Attachment Agreement.

WHEREAS, the parties now desire to expand the geographic areas included within the Attachment Agreement so as to permit the Television Company to attach its facilities on poles of the Electric Company within the City of Goveland [*sic*], Florida and the City of Mascotte, Florida.

NOW THEREFORE, in consideration of the above premises [*sic*] and of the mutual benefits from the covenants herein set forth, the Electric Company and the Television Company do hereby agree as follows:

1. The Attachment Agreement is hereby amended by adding the following provision to Schedule "I" after item 17:

> "18. June 18, 1979—between Florida Power Corporation and Teleprompter Corporation and Teleprompter Southeast, Inc.—for service to the City of Groveland, Florida and the City of Mascotte, Florida."



2. Except as amended herein, the Attachment Agreement shall be unaffected by this agreement and shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate, and their corporate seal to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.

| | |
|---|---|
| (corporate seal) | FLORIDA POWER CORPORATION |
| Attest: /s/ Betty M. Clayton<br>Ass't Secretary | By /s/ Ned B. Sparke<br>Vice President |
| (corporate seal) | TELEPROMPTER CORPORATION |
| Attest: /s/ Claire Feldman<br>Ass't Secretary | By /s/ Illegible<br>Illegible |
| (corporate seal) | TELEPROMPTER SOUTHEAST, INC. |
| Attest: /s/ Claire Feldman<br>Ass't Secretary | By /s/ Illegible<br>President |

LAW OFFICES OF
HOGAN & HARTSON

815 CONNECTICUT AVENUE
WASHINGTON, D.C. 20006

TELEPHONE (202) 331-4500
CABLE ADDRESS "HOGANDER WASHINGTON"
TELEX 89-2757-64353

WRITER'S DIRECT DIAL NUMBER
(202) 331-4796

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 2, 1980

James A. McGee, Esquire
Corporate Counsel
Florida Power Corporation
3201 Thirty-Fourth Street South
P.O. Box 14042
St. Petersburg, Florida 33733

Re: Pole Attachment Agreements Between Florida Power Corporation and Teleprompter Corporation

Dear Mr. McGee:

As you may be aware, on May 29, 1980, The Florida Supreme Court held in *Teleprompter Corporation* v. *Hawkins*, No. 56,291, that the Florida Public Service Commission has no jurisdiction to regulate pole attachment rates. Accordingly, we now renew Teleprompter's request for information related to Florida Power's pole attachment rates, in anticipation of the PCS's prompt withdrawal of its certification of jurisdiction made to the Federal Communications Commission under Section 224 of the Communications Act of 1934, as amended.

Teleprompter Corporation is currently paying annual rate of $6.24 (Deland, Haines City, New Port/Richey, and Winter Garden) and $5.74 (St. Petersburg) for attachment to Florida Power's poles. So that we may assess the propriety of this rate under Section 224 of the Communications Act of 1934, as amended, we hereby request the data set forth below. The information provided to us should be based upon historical costs and should use data on the Federal Energy Regulatory Commission's Form 1.



The requests herein are limited to data relating to your service area within the State of Florida. Please specify if data are provided on any other basis. Also, please include all calculations and work sheets necessary to verify the requested data. We request you provide us with your most current data and accompany your responses with such information as is necessary to identify the dates of the data provided.

Specifically we request the following:

(1) The gross investment in pole lines.

(2) The depreciation reserve from the gross investment in pole lines.

(3) The gross investment in cross-arms, guys, anchors and other equipment, either not useful in pole attachment or previously paid for or provided separately by the cable operator.

(4) The depreciation reserve from the gross investment specified in (3).

(5) The number of poles (a) owned, and (b) controlled or used by Florida Power.

(6) The number of poles owned, controlled, or used by Florida Power on which are television cable attachments which are subject to agreements with Teleprompter Corporation.

(7) The number of poles included in (6) which Florida Power controls or uses through lease between Florida Power and other owners, and the amounts paid by Florida Power under such lease(s).

(8) The number of poles included in (6) which Florida Power owns and which are leased to other users by Florida Power and the amounts received by Florida Power under such lease(s).

(9) The components of annual carrying charges attributable to the cost of owning a pole as listed below. These charges may be expressed as a percentage of the *net* pole investment. If the annual carrying charges are expressed in any other form (*e.g.*, as a percentage of gross investment) please specify such basis and the assumptions used. For each of the following components of the annual carrying charge, please specify the account or accounts of FERC Form 1 used in computing the carrying charge and provide sufficient calculations to verify the charge claimed.

(a) Maintenance expenses.

(b) Depreciation. Specify the average life expectancy for poles, the net salvage value and the method of depreciation used.

(c) *Ad valorem* taxes attributable to poles.

(d) Administration and overhead not directly allocable to any other revenue generating service or services. In order to compute attributable administration and overhead expenses, the total of such expenses and the net investment in total plant are also requested.

(e) Cost of capital. In order to compute the cost of capital, the following items are requested: (i) allowable rate of return authorized by the appropriate regulatory agency; (ii) cost of debt (interest rate); (iii) cost of equity, both common and preferred (including an adjustment for income taxes actually paid); and (iv) the relative amounts of debt, preferred equity, and common equity.



(10) The amount of reimbursements, if any, which have been received from cable operators for non-recurring costs, including pre-construction make-ready and changeouts, and which have been included in (1) above. Please state whether or not such reimbursements have been subtracted from the amounts set forth in (1)-(4) above.

The foregoing requests are pursuant to 47 C.F.R. §§ 1.1401-1.1415, as adopted by the Federal Communications Commission in its *First Report and Order in CC Docket 78-144*, 68 F.C.C.2d 1585 (1978), its *Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59 (1979), and its *Memorandum Opinion and Order in CC Docket 78-144*, 46 R.R.2d 1637 (1980). It is requested that you respond to this request by letter dated no later than thirty (30) days after the date hereof. We are anxious to cooperate and hope that you will respond fully and promptly. Under the terms of the FCC's rules, failure to provide the data requested, promptly and in usable form, may result in findings by the FCC adverse to Florida Power Corporation.

Sincerely,

/s/ GARDNER F. GILLESPIE
Gardner F. Gillespie
Attorney for
Teleprompter Corporation

GFG:tmb

## EXHIBIT C

### Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreciation reserve, less an additional 15% to reflect that part of the gross plant attributable to cross arms and other items not usable for CATV attachments. It is assumed that the pole depreciation reserve bears the same ratio to gross pole investment as the total plant depreciation reserve bears to total plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \text{Ratio of Pole Depreciation Reserve to Gross Pole Investment}$$

$$\frac{\$414,191,834}{\$2,043,936,824} = 20.3\%$$

20.3% x Gross Pole Investment = Pole Depreciation Reserve

20.3% x $81,841,613 = $16,613,847

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x ($81,841,613 - $16,613,847) = $55,443,601

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles.

$$\frac{\text{Net Investment in Bare Poles}}{\text{(Number of Poles)}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$55,443,601}{?} = ?$$

Because the number of poles owned by Respondent is not publicly available, it is assumed that Respondent's net investment per bare pole is no greater than that of its



geographic neighbor, General Telephone Company of Florida.

From information available on FCC Form M for the year ending December 31, 1979, General Telephone's net investment per pole can be shown to be $57.18, following the formula prescribed by the Commission in Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, No. 80-372 (F.C.C., July 19, 1980).

Gross pole investment is $11,915,853. Form M at 19 line 11, col. (h). The ratio of the pole depreciation reserve to gross pole investment can be estimated by finding the ratio of the depreciation reserve for all plant to gross plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \frac{\$387,662,630}{\$1,770,047,179} = 21.9\%$$

Form M at 12 line 6, col. (c) & 19 line 23, col. (h).

21.9% x Gross Pole Investment = Pole Depreciation Reserve

21.9% x $11,915,853 = $2,609,572

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x (11,915,853 - 2,609,572) = $7,910,339

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$7,910,339}{138,332} = \$57.18$$

Number of poles: Form M At 74 line 1, col. (n).

3. *Carrying Charge.* Carrying Charge is composed of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole maintenance expense by the net pole investment (gross pole investment less depreciation reserve):

Pole Maintenance Expense / (Gross Pole Investment - Depreciation Reserve) = Maintenance Expense (expressed as a percentage of net pole investment)

$$\frac{\$8,107,911}{(\$81,841,613 - \$16,613,847)} = 12.4\%$$

b. *Depreciation.* The depreciation rate does not appear in FERC Form 1 and has not been disclosed by Respondent. It may be calculated for straight-line depreciation as the quotient of 1 minus salvage value (as a proportion of cost) divided by the useful life of a utility pole.

$$\frac{(1 - \text{salvage value})}{30} = \text{depreciation rate for gross investment}$$

$$\frac{1 - 0}{30} = 3.3\%$$

Depreciation Rate for Gross Pole Investment x (Gross Pole Investment / Net Pole Investment) = Depreciation (expressed as a percentage of net pole investment)

$$3.3\% \times \frac{\$81,841,613}{(\$81,841,613 - \$16,613,847)} = 4.1\%$$

c. *Administrative Expense.* Form 1 does not provide figures for administrative expenses associated only with poles. We have assumed, for purposes of developing a complete carrying charge, that net pole investment carries



the same proportion of these expenses as total net plant. The administrative expense may be expressed as a percentage of net plant investment by dividing the administrative expense by the difference between the gross plant investment and plant depreciation reserve.

Administrative Expense / (Gross Plant Investment - Depreciation Reserve) = Administrative Expense (expressed as a percentage of net plant investment)

$$\frac{\$22,714,058}{(\$2,043,936,824 - \$414,191,834)} = 1.4\%$$

d. *Taxes.* Form 1 does not provide figures for tax expense attributable to pole lines only. It is therefore assumed that net pole investment bears the same proportion of tax expenses as total net plant. Tax expense may be expressed as a percentage of net plant by dividing taxes paid by the difference between the gross plant investment and plant depreciation reserve.

Taxes Paid / (Gross Plant - Depreciation) (Investment Reserve) = Taxes (expressed as percentage of net plant investment)

$$\frac{\$74,931,556}{(\$2,043,936,824 - \$414,191,834)} = 4.6\%$$

e. *Cost of Capital.* Form 1 does not include a cost of capital figure (return on equity and interest on debt). Therefore, we have used the reasonable assumption of 10% for the cost of capital component of the carrying charge.

10%

f. *Total Carrying Charge.* Adding the various percentage components, we have determined the appropriate carrying charge to be 32.5%:

| | |
|---|---|
| Maintenance Expense | 12.4% |
| Depreciation | 4.1% |
| Administrative Expense | 1.4% |
| Taxes | 4.6% |
| Cost of Capital | 10.0% |
| TOTAL CARRYING CHARGE | 32.5% |

4. *Use ratio.* The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) and the total useable space. Since Respondent has not provided any data to calculate useable space, it may be presumed that a reasonable estimate of 13.5 feet may be used. 47 C.F.R. § 1.1409(a); Second Report and Order in CC Docket 78-144, 72 F.C.C.2d 59, 68-69, (1979); Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Tel. Co. of W. Va., No. 80-732, ¶ 9 (F.C.C. July 16, 1980).

Space used by CATV = Use Ratio
Total Useable Space

1 Foot = 7.41%
13.5 Feet

5. *Maximum Rate.* The maximum rate is the product of net investment per bare pole times the carrying charge times the use ratio.

Net Investment per bare pole
x Carrying Charge
x Use Ratio
= Maximum Rate

$57.18
x 32.50%
x 7.41%
= $ 1.38

6. *Source of Data.* The following table provides the location in Form 1 for the various figures used in the calculations.



**Table of Location in FERC Form 1**

| *Item* | *Page* | *Location* |
|---|---|---|
| Gross Plant Investment | 113 | Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 12, Column (b) |
| Plant Depreciation Reserve | 113 | Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 13, Column (b) |
| Pole Maintenance Expense | 419 | Electric Operation and Maintenance Expenses, Line No. 118, "593 Maintenance of Overhead Lines," Column (b) |
| Gross Pole Investment | 402 | Electric Plant in Service, Line No. 59, "364 Poles, Towers and Fixtures," Column (g) |
| Administrative Expense | 420 | Electric Operation and Maintenance Expenses, Line No. 164, "Total Operation" Column (b) |
| Taxes Paid | 114 | Statement of Income for the Year, Lines 11-13, Taxes, Column (c) |

# ANNUAL REPORT

of

# GENERAL TELEPHONE COMPANY OF FLORIDA

TAMPA, FLORIDA

TO THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FOR THE

YEAR ENDED DECEMBER 31, 1979

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Two copies of the published annual report to stockholders were forwarded in the Commission about March 31, 1980

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Officer or other person to whom correspondence should be addressed concerning this report:

| | |
|---|---|
| Robert A. Lindsay | Vice President and Controller |
| 610 Morgan Street | Tampa Florida |
| 224-4581 | |

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This information is to be kept current by prompt notification to the Commission of any changes until the report for the successing year has been submitted.

## 10. BALANCE SHEET
### Assets and Other Debits

| Line No. | Item (a) | | Balance at Beginning of the Year (b) | Balance at End of the Year (c) | Increase (d) |
|---|---|---|---|---|---|
| | TELEPHONE PLANT | | $ | $ | $ |
| 1 | 100.1 Telephone plant in service | 12A | 1,615,415,327 | 1,770,047,179 | 154,631,852 |
| 2 | 100.2 Telephone plant under construction | 12A | 79,777,952 | 93,098,447 | 13,220,495 |
| 3 | 100.3 Property held for future telephone use | 12A | 1,673,161 | 26,886 | ( 1,646,275) |
| 4 | 100.4 Telephone plant acquisition adjustment | 13B | — | — | — |
| 5 | Subtotal (Lines 1 to 4, inclusive) | ..... | 1,696,866,440 | 1,863,172,512 | 166,306,072 |
| 6 | Less: 171 Depreciation reserve | 14A | 348,157,461 | 387,662,630 | 39,505,169 |
| 7 | 172 Amortization reserve | 15A | — | — | — |
| 8 | Line 5 minus lines 6 and 7 | ..... | 1,348,708,979 | 1,475,509,882 | 126,800,903 |
| 9 | 100.7 Telephone plant adjustment | ..... | — | — | — |
| 10 | Total (line 8 plus line 9) | ..... | 1,348,708,979 | 1,475,509,882 | 126,800,903 |
| | INVESTMENTS AND FUNDS | | | | |
| 11 | 101.1 Investments in affiliated companies | 17 | — | — | — |
| 12 | 101.2 Advances to affiliated companies | 17 | — | — | — |
| 13 | 102 Other investments | 17 | 5,750 | 1,000 | ( 4,750) |
| 14 | 103 Miscellaneous physical property | 16 | 5,299,577 | 2,752,191 | ( 2,547,386) |
| 15 | 104 Sinking funds (excluding respondent's own issues) (see Note 1) | 18 | — | — | — |
| 16 | 136 Provident funds (excluding respondent's own issues) (see Note 1) | 60D | — | — | — |
| 17 | 137 Insurance and other funds (excluding respondent's own issues) (see Note 1) | 18 | — | — | — |
| 18 | Total | ..... | 5,305,327 | 2,753,191 | ( 2,522,163) |
| | CURRENT ASSETS | | | | |
| 19 | 113 Cash | ..... | 7,389,055 | 9,434,022 | 2,044,967 |
| 20 | 114 Special cash deposits | 19 | 866,919 | 1,015,195 | 148,276 |
| 21 | 115 Working funds | ..... | 216,650 | 220,900 | 4,250 |
| 22 | 116 Temporary cash investments | 17 | — | — | — |
| 23 | 117.1 Notes receivable from affiliated companies | 20 | — | — | — |
| 24 | 117.2 Other notes receivable | 20 | 69,425 | 91,775 | 22,350 |
| 25 | 118 Due from customers and agents (see Note 2) | 21A | 50,762,953 | 64,503,466 | 13,740,513 |
| 26 | 120.1 Accounts receivable from affiliated companies | 21 | 1,587,763 | 3,685,473 | 2,097,710 |
| 27 | 120.2 Other accounts receivable | 21 | 2,174,451 | 5,038,651 | 2,864,200 |
| 28 | 121 Interest and dividends receivable | ..... | — | — | — |
| 29 | 122 Material and supplies | ..... | 27,634,850 | 37,537,266 | 9,902,416 |
| 30 | 123 Other current assets | ..... | — | — | — |
| 31 | Total | ..... | 90,702,066 | 121,526,748 | 30,824,682 |
| | OTHER ASSETS | | | | |
| 32 | 126 Subscriptions to capital stock | ..... | — | — | — |
| 33 | 127 Subscriptions to funded debt | ..... | — | — | — |
| 34 | Total | ..... | — | — | — |
| | PREPAID ACCOUNTS AND DEFERRED CHARGES | | | | |
| 35 | 129 PREPAID RENTS | ..... | 1,105,779 | 1,402,268 | 296,489 |
| 36 | 130 Prepaid taxes | 36B | 84,624 | 90,540 | 5,916 |
| 37 | 131 Prepaid insurance | ..... | 891,099 | 473,263 | 417,836) |
| 38 | 132 Prepaid directory expenses | ..... | 357,450 | 409,300 | 51,850 |
| 39 | 133 Other prepayments | ..... | 222,029 | 663,193 | 441,164 |
| 40 | 135 Discount on long-term debt | ..... | 4,764,405 | 4,503,412 | ( 260,993) |
| 41 | 138 Extraordinary maintenance and retirements | 22 | — | — | — |
| 42 | 139 Other deferred charges | 22 | 1,468,806 | 1,845,942 | 377,117 |
| 43 | Total | ..... | 8,894,212 | 9,337,919 | 493,707 |
| 44 | Total Assets and Other Debits | ..... | $1,453,610,584 | $1,609,277,740 | $ 155,567,156 |



( ) denotes reverse amount

## 12A. ANALYSIS OF TELEPHONE PLANT ACCOUNTS

Report in column (c) all amounts relating to purchases of plant accounted for in accordance with paragraphs (a) and (b) of Section 31.2-21 of the Commission's Rules.

2. Each transfer or adjustment between accounts listed in this schedule, or between accounts listed in this schedule and other accounts, shall be included in column (g) and explained in a note, except the following which shall be included in columns (c) through (f), as appropriate: (1) transfers and adjustments amounting to less than $5,000; (2) adjustments and corrections of additions and retirements for the current or the preceding year, (3) transfers involving account 100.2 the plant accounts, and account 100.3 made in connection with the closing of the records of construction work orders or authorizations; and (4) routine entries relating to the acquisition, sale, retirement, or change in the use, of plant, such as transfers among accounts 201 to 264, inclusive, 276, 277, 100.3 and 100.4.

| Line No. | Account (a) | Balance at Beginning of the Year (b) | CHARGES DURING THE YEAR | |
|---|---|---|---|---|
| | | | Plant Acquired from Predecessors (see instruction 1) (c) | Other Plant Added (d) |
| | | $ | $ | $ |
| | 100.1 TELEPHONE PLANT IN SERVICE | | | |
| 1 | 201 Organization | — | | — |
| 2 | 202 Franchises | — | | — |
| 3 | 203 Patent rights | — | | — |
| 4 | 207 Right-of-way (Deleted 1-1-60) | — | | — |
| 5 | 211 Land | 11,747,189 | | 373,076 |
| 6 | 212 Buildings | 112,087,971 | | 4,507,330 |
| 7 | 221 Central office equipment | 660,369,661 | | 90,620,378 |
| 8 | 231 Station apparatus | 130,784,529 | | 32,227,422 |
| 9 | 232 Station connections | 162,253,776 | | 41,306,590 |
| 10 | 234 Large private branch exchs. | 55,983,485 | | 7,708,398 |
| 11 | 241 Pole lines | 11,401,694 | | 820,648 |
| 12 | 242.1 Aerial cable | 56,774,025 | | 3,868,016 |
| 13 | 242.2 Underground cable | 90,341,953 | | 12,647,257 |
| 14 | 242.3 Buried cable | 216,716,604 | | 29,366,468 |
| 15 | 242.4 Submarine cable | 3,810,857 | | 59,171 |
| 16 | 243 Aerial wire | 2,296,154 | | 604,132 |
| 17 | 244 Underground conduit | 62,422,212 | | 6,226,294 |
| 18 | 261 Furniture and office equip | 11,295,443 | | 1,603,236 |
| 19 | 264 Vehicles and other work equip | 27,129,774 | | 1,721,731 |
| 20 | Subtotal (Lines 1-19, incl.) | 1,615,415,327 | | 233,661,147 |
| 21 | 276 Telephone plant acquired | | | |
| 22 | 277 Telephone plant sold | | xx | xx |
| 23 | Subtotal (Lines 20-22, incl.) | 1,615,415,327 | | 233,661,147 |
| 24 | 100.2 Telephone plant under construction | 79,777,952 | | 13,320,495 |
| 25 | 100.3 Property held for future telephone use | 1,673,161 | | ( 1,646,275) |
| 26 | 100.4 Telephone plant acquisition adjustment | — | | — xx |
| 27 | Subtotal (Lines 23-26, incl.) | 1,696,866,440 | | 245,335,367 |
| 28 | 100.7 Telephone plant adjustment | | | |
| 29 | Total | $1,696,866,440 | | $245,335,367 |



( ) denotes credit amount in column (g) and reverse amount in other columns.

12A. ANALYSIS OF TELEPHONE PLANTS ACCOUNTS - (continued)

3. Credits to accounts listed in this schedule relating to property retired and charged to account 103, "Miscellaneous physical property," shall be included in column (f).

| Line No. | CREDITS DURING THE YEAR | | Transfers and Adjustments (Charges and (Credits)) | Balance at End of the Year |
|---|---|---|---|---|
| | Plant Sold with Traffic (e) | Other Plant Retired (f) | (g) | (h) |
| | $ | $ | $ | $ |
| 1 | | — | | — |
| 2 | | — | | — |
| 3 | | — | | — |
| 4 | | ( 27,404) | | 12,147,669 |
| 5 | | 416,189 | | 116,179,112 |
| 6 | | 36,783,048 | | 714,207,491 |
| 7 | | 9,286,634 | | 153,725,317 |
| 8 | | 14,962,823 | | 188,597,543 |
| 9 | | 8,250,143 | | 55,442,240 |
| 10 | | 306,489 | | 11,915,853 |
| 12 | | 860,932 | | 59,781,109 |
| 13 | | 216,851 | | 102,772,359 |
| 14 | | 2,029,069 | | 244,054,003 |
| 15 | | ( 497) | | 3,870,525 |
| 16 | | 202,979 | | 2,697,307 |
| 17 | | 46,937 | | 68,601,569 |
| 18 | | 1,191,197 | | 11,707,482 |
| 19 | | 4,503,905 | | 24,347,600 |
| 20 | | 79,029,295 | | 1,770,047,179 |
| 21 | x | x | | |
| 22 | | | | |
| 23 | | 79,029,295 | | 1,770,047,179 |
| 24 | | — | | 93,098,447 |
| 25 | | — | | 26,886 |
| 26 | | — | | — |
| 27 | | 79,029,295 | | 1,863,172,512 |
| 28 | | — | | — |
| 29 | | 79,029,295 | | 1,863,172,512 |

( ) denotes credit amount in column (g) and reverse amount in other columns.

## 50. OUTSIDE PLANT STATISTICS

1. Report the mileage at the end of the year for all solely owned plant and the respondent's proportionate interest in jointly owned plant.
2. If any required data are available only in part or on an estimated basis, explain in a note.

| Line No. | State or Territory (a) | Miles of Aerial Wire (b) | AERIAL CABLE | | UNDERGROUND CABLE | |
|---|---|---|---|---|---|---|
| | | | Miles of Cable (c) | Miles of Wire in Cable (d) | Miles of Cable (e) | Miles of Wire in Cable (f) |
| 1 | Florida | 6,249 | 8,620 | 1,553,500 | 1,962 | 4,305,997 |
| 2 | | | | | | |
| 3 | | | | | | |
| 4 | | | | | | |
| 5 | | | | | | |
| 6 | | | | | | |
| 7 | | | | | | |
| 8 | | | | | | |
| 9 | | | | | | |
| 10 | | | | | | |
| 11 | | | | | | |
| 12 | | | | | | |
| 13 | | | | | | |
| 14 | | | | | | |
| 15 | Total | 6,249 | 8,620 | 1,553,500 | 1,962 | 4,305,997 |

| Line No. | State or Territory (m) | Number of Poles (n) | Miles of Tube in Coaxial Cable (o) | UNDERGROUND CONDUIT | |
|---|---|---|---|---|---|
| | | | | Trench Miles (p) | Duct Miles (q) |
| 1 | Florida | 138,332 | 586 | 1,821 | 7,944 |
| 2 | | | | | |
| 3 | | | | | |
| 4 | | | | | |
| 5 | | | | | |
| 6 | | | | | |
| 7 | | | | | |
| 8 | | | | | |
| 9 | | | | | |
| 10 | | | | | |
| 11 | | | | | |
| 12 | | | | | |
| 13 | | | | | |
| 14 | | | | | |
| 15 | Total | 138,332 | 586 | 1,821 | 7,944 |

# ELECTRIC UTILITIES AND LICENSEES

**(Classes A and B)**

## ANNUAL REPORT

**OF**

FLORIDA POWER CORPORATION

(Exact legal name of respondent)

3201 - 34TH STREET SOUTH, ST. PETERSBURG, FLORIDA 33711

(Address of principal business office at end of year)

**TO THE**

**FEDERAL ENERGY REGULATORY COMMISSION**

**YEAR ENDED DECEMBER 31, 1979**

Name, title, address and telephone number (including area code), of the person to be contacted concerning this report:

R. R. HAYES, VICE-PRESIDENT AND CONTROLLER

3201 - 34TH STREET SOUTH, ST. PETERSBURG, FLORIDA 813-866-5151

STATEMENT B SUMMARY OF UTILITY PLANT AND ACCUMULATED PROVISIONS FOR DEPRECIATION, AMORTIZATION AND DEPLETION

| Line No | Item (a) | Total (b) | Electric (c) | Gas (d) | (e) | (f) | Common* (g) |
|---|---|---|---|---|---|---|---|
| 1 | UTILITY PLANT | $ | $ | $ | $ | $ | $ |
| 2 | In Service: | | | | | | |
| 3 | Plant in Service (Classified) | 1925 228 144 | 1925 228 144 | | | | |
| 4 | Plant Purchased or Sold | | | | | | |
| 5 | Completed Construction not Classified | | | | | | |
| 6 | Experimental Plant Unclassified | | | | | | |
| 7 | Total | 1925 228 144 | 1925 228 144 | | | | |
| 8 | Leased to Others | | | | | | |
| 9 | Held for Future Use | 2 433 496 | 2 433 496 | | | | |
| 10 | Construction Work in Progress | 116 275 184 | 116 275 184 | | | | |
| 11 | Acquisition adjustments | | | | | | |
| 12 | Total Utility Plant | 2043 936 824 | 2043 936 824 | | | | |
| 13 | Accum. Prov. for Dept., Amort., & Depl. | 414 191 834 | 414 191 834 | | | | |
| 14 | Net Utility Plant | 1629 744 990 | 1629 744 990 | | | | |
| 15 | DETAIL OF ACCUMULATED PROVISIONS FOR DEPRECIATION, AMORTIZATION, & DEPLETION | | | | | | |
| 16 | In Service: | | | | | | |
| 17 | Depreciation | 414 191 834 | 414 191 834 | | | | |
| 18 | Amort. and Depl. of Producing Natural Gas Land and Land Rights | | | | | | |
| 19 | Amort. of Underground Storage Land and Land Rights | | | | | | |
| 20 | Amort. of Other Utility Plant | | | | | | |
| 21 | Total, in Service | 414 191 834 | 414 191 834 | | | | |
| 22 | Leased to Others: | | | | | | |
| 23 | Depreciation | | | | | | |
| 24 | Amortization and Depletion | | | | | | |
| 25 | Total, Leased to Others | | | | | | |
| 26 | Held for Future Use: | | | | | | |
| 27 | Depreciation | | | | | | |
| 28 | Amortization | | | | | | |
| 29 | Total, Held for Future Use | | | | | | |
| 30 | Abandonment of Leases (natural gas) | | | | | | |
| 31 | Amort of Plant Acquisition Adj | | | | | | |
| 32 | Total Accumulated Provisions (should agree with line 13 above) | 414 191 834 | 414 191 834 | | | | |

*See 351 for detail of common utility plant and exposures

## STATEMENT C STATEMENT OF INCOME FOR THE YEAR

Amounts recorded in accounts 412 and 413, Revenue from Utility Plant Leased to Others, will be reported using one of the vertical columns to spread amounts over lines 1 to 19, as appropriate similar to a utility department. These amounts will also be included in columns (c) and (d) totals.

2. Amounts recorded in account 414, Other Utility Operating Income, will be reported in a separate column as prescribed for accounts 412 and 413, above.

3. The space below is provided for important notes regarding the statement of income or any account thereof.

4. Give concise explanations concerning unsettled rate proceedings where a contingency exists that refunds of a material amount may need to be made to the utility's customers or which may result in a material refund to the utility with respect to power or gas purchases. State for each year affected the gross revenues or costs to which the contingency relates and the tax effects together with an explanation of the major factors which affect the rights of the utility to retain such revenues or recover amounts of the utility to retain such revenues or recover amounts paid with respect to power and gas purchasers.

5. Give concise explanations concerning significant amounts of any refunds made or received during the year resulting from settlement of any rate proceeding affecting revenues received or costs incurred for power or gas purchasers. State the accounting treatment accorded such refunds and furnish the necessary particulars, including income tax effects, so that corrections of prior income and

| Line | Account | Sch. Page No | TOTAL | | ELECTRIC |
|---|---|---|---|---|---|
| | | | Current year | Increase or decrease from preceding year | Current year |
| | (a) | (b) | (c) | (d) | (e) |
| 1 | *UTILITY OPERATING INCOME* | | | | |
| 2 | Operating Revenues (40C) | — | $835 493 243 | $84 273 263 | $ |
| 3 | Operating Expenses | | | | |
| 4 | Operation Expenses (401) | — | 486 076 137 | 90 721 045 | |
| 5 | Maintenance Expenses (402) | — | 44 884 750 | 8 312 436 | |
| 6 | Depreciation Expense (403) | — | 64 356 773 | 4 996 174 | |
| 7 | Amort. & Depl. of Utility Plant (404*-405) | — | | | |
| 8 | Amort. of Utility Plant Acq. Adj. (406) | — | | | |
| 9 | Amort. of Property Losses (407)* | — | 653 203 | 653 203 | SAME |
| 10 | Amort. of Conversion Expenses (407)* | — | | | |
| 11 | Taxes Other Than Income Taxes (408.1) | 222 | 48 664 961 | 4 038 139 | AS |
| 12 | Income Taxes-Federal (409.1) | 222 | 21 650 417 | (26 452 422) | |
| 13 | -Other (409.1) | 222 | 4 615 178 | (1 698 217) | TOTAL |
| 14 | Provision for Deferred Inc. Taxes (410.1) | | 33 825 000 | 4 951 000 | |
| 15 | Provision for Deferred income Taxes-Cr. (411.1) | | ( 12 234 000) | (5 928 000) | ( ) |
| 16 | Investment Tax Credit Adj.-Net (411.4) | 228-9 | 15 661 000 | 8 910 000 | |
| 17 | Gains from Disp. of Utility Plant (411.6) | 224A | ( ) | | ( ) |
| 18 | Losses from Disp. of Utility Plant (411.7) | 214A | | | |
| 19 | Total Utility Operating Expenses | | $708 153 419 | $88 503 358 | $ |
| 20 21 | Net Utility Operating Income (carry forward to page 116-A, line 22) | | $127 339 824 | $ (4 230 095) | $ |

NOTES TO STATEMENT OF INCOME

Refer to notes on Balance Sheet pages 112, 112A, 112B, and 112C.

*Accounts 404.1, 404.2, 404.3, 407.1, 407.2 for natural gas companies

ELECTRIC PLANT IN SERVICE (Continued)

| Line No | Account (a) | Balance beginning of year (b) | Additions (c) | Retirements (d) | Adjustments (e) | Transfers (f) | Balance end of year (g) |
|---|---|---|---|---|---|---|---|
| 33 | OTHER PRODUCTION PLANT | $ | $ | $ | $ | $ | $ |
| 34 | (340) Land and land rights | 2 762 566 | | | | | 2 762 566 |
| 35 | (341) Structures and improvements | 9 239 756 | 16 881 | 9 586 | | | 9 247 051 |
| 36 | (342) Fuel holders, prod, and access'rs | 13 370 209 | 12 147 | 6 719 | | | 13 375 637 |
| 37 | (343) Prime movers | 82 879 817 | 164 168 | | | | 83 043 985 |
| 38 | (344) Generators | 28 365 698 | | | | | 28 365 698 |
| 39 | (345) Accessory electric equipment | 15 352 178 | 93 738 | 5 539 | | | 15 440 377 |
| 40 | (346) Misc power plant equipment | 522 762 | 111 114 | 3 126 | | 332 | 631 082 |
| 41 | Total other prod plant | 152 492 986 | 398 048 | 24 970 | | 332 | 152 866 396 |
| 42 | Total production plant | 963 793 618 | 35 184 977 | 6 010 263 | (44 060) | 2 842 | 992 927 114 |
| 43 | 3 TRANSMISSION PLANT | | | | | | |
| 44 | (350) Land and land rights | 20 570 319 | 487 917 | 2 186 | 79 938 | | 21 135 988 |
| 45 | (352) Structures and improvements | 6 555 076 | 322 474 | 15 894 | | (1 462) | 6 860 194 |
| 46 | (353) Station equipment | 90 475 326 | 9 429 084 | 4 100 916 | | 1 185 337 | 96 988 831 |
| 47 | (354) Towers and fixtures | 47 751 978 | 223 | 334 872 | | (1 204) | 47 416 125 |
| 48 | (355) Poles and fixtures | 44 296 879 | 8 263 799 | 936 348 | 111 064 | (3 155) | 51 732 239 |
| 49 | (356) Overhead conductors and devices | 76 149 334 | 7 713 649 | 961 603 | 89 720 | | 82 991 100 |
| 50 | (357) Underground conduit | 7 492 502 | | | | | 7 492 502 |
| 51 | (358) Underground conductors and dev | 9 666 266 | | | | | 9 666 266 |
| 52 | (359) Roads and trails | 1 829 306 | 166153 | 24 518 | | | 1 970 941 |
| 53 | Total transmission plant | 304 786 986 | 26 383 299 | 6 376 337 | 280 722 | 1 179 516 | 326 254 186 |
| 54 | 4. DISTRIBUTION PLANT | | | | | | |
| 55 | (360) Land and land rights | 3 116 277 | 68 532 | | 295 303 | | 3 480 112 |
| 56 | (361) Structures and improvements | 6 273 721 | 971 060 | 49 147 | | 35 716 | 7 231 350 |
| 57 | (362) Station equipment | 92 922 149 | 11 821 350 | 1 108 349 | | (1 112 320) | 102 522 830 |
| 58 | (363) Storage battery equipment | | | | | | |
| 59 | (364) Poles, towers, and fixtures | 76 013 468 | 6 918 199 | 1 159 045 | 65 836 | 3 155 | 81 841 613 |
| 60 | (365) Overhead conductors and devices | 65 118 723 | 6 327 823 | 1 182 397 | 81 565 | (1 309) | 70 344 405 |
| 61 | (366) Underground conduit | 10 976 511 | 617 327 | 68 070 | | 451 018 | 11 976 786 |
| 62 | (367) Underground conductors and dev. | 28 839 197 | 3 179 722 | 382 597 | 13 430 | (473 271) | 31 176 481 |
| 63 | (368) Line transformers | 93 910 675 | 7 997 601 | 798 898 | 57 503 | 15 959 | 101 182 840 |
| 64 | (369) Services | 47 193 319 | 6 575 073 | 302 782 | 26 670 | 5 276 | 53 497 556 |
| 65 | (370) Meters | 31 419 252 | 2 716 123 | 226 153 | | (12 006) | 33 897 216 |
| 66 | (371) Installations on cust premises | 228 438 | 51 658 | 4 507 | | (2 928) | 272 661 |

## ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

| Line No. | Account (a) | Amount for year (b) | Increase or decrease from preceding year (c) |
|---|---|---|---|
| 108 | DISTRIBUTION EXPENSES (CONTINUED) | $ | $ |
| 109 | 586 Meter Expenses | $ 1 875 598 | $ 129 965 |
| 110 | 587 Customer installations expenses | 810 437 | 35 551 |
| 111 | 588 Miscellaneous distribution expenses | 2 566 305 | 368 910 |
| 112 | 589 Rents | 201 651 | 18 711 |
| 113 | Total operation | 9 530 820 | 1 267 512 |
| 114 | *Maintenance* | | |
| 115 | 590 Maintenance supervision and engineering | 846 062 | 125 008 |
| 116 | 591 Maintenance of structures | 150 847 | (8 221) |
| 117 | 592 Maintenance of station equipment | 1 874 628 | 603 313 |
| 118 | 593 Maintenance of overhead lines | 8 107 911 | 1 176 438 |
| 119 | 594 Maintenance of underground lines | 928 586 | 117 959 |
| 120 | 595 Maintenance of line transformers | 584 806 | 259 670 |
| 121 | 596 Maintenance of street lighting and signal systems | 820 881 | 134 079 |
| 122 | 597 Maintenance of meters | 218 264 | 29 850 |
| 123 | 598 Maintenance of miscellaneous distribution plant | 119 730 | 9 323 |
| 124 | Total maintenance | 13 651 715 | 2 447 419 |
| 125 | Total distribution expenses | 23 182 535 | 3 714 931 |
| 126 | CUSTOMER ACCOUNTS EXPENSES | | |
| 127 | *Operation* | | |
| 128 | 901 Supervision | 1 011 725 | 59 155 |
| 129 | 902 Meter reading expenses | 2 590 872 | 203 036 |
| 130 | 903 Customer records and collection expenses | 8 666 740 | 929 457 |
| 131 | 904 Uncollectible accounts | 1 020 000 | (446 677) |
| 132 | 905 Miscellaneous customer accounts expenses | 674 694 | 179 566 |
| 133 | Total customer accounts expenses | 13 964 031 | 924 537 |
| 134 | CUSTOMER SERVICE AND INFORMATION EXPENSES | | |
| 135 | Operation | | |
| 136 | 907 Supervision | 69 955 | 8 225 |
| 137 | 908 Customer assistance expenses | 861 729 | 300 302 |
| 138 | 909 Informational and instructional expenses | 411 057 | 15 242 |
| 139 | 910 Miscellaneous customer service & informational expenses | 46 352 | 2 579 |
| 140 | Total customer service and informational expenses | 1 389 093 | 326 348 |
| 141 | SALES EXPENSES | | |
| | *Operation* | | |
| 143 | 911 Supervision | 34 128 | 5 098 |
| 144 | 912 Demonstrating and selling expenses | 75 640 | 9 434 |
| 145 | 913 Advertising expenses | 133 | 101 |
| 146 | 916 Miscellaneous sales expenses | 15 681 | 7 344 |
| 147 | Total sales expenses | 125 582 | 21 977 |
| 148 | ADMINISTRATIVE AND GENERAL EXPENSES | | |
| 149 | *Operation* | | |
| 150 | 920 Administrative and general salaries | 6 775 432 | 805 634 |
| 151 | 921 Office supplies and expenses | 2 548 561 | 162 972 |
| 152 | 922 Administrative expenses transferred-Cr | ( 29 473) | (2 077) |
| 153 | 923 Outside services employed | 1 331 660 | 161 542 |
| 154 | 924 Property insurance | 1 964 798 | 169 309 |
| 155 | 925 Injuries and damages | 1 843 746 | 447 711 |
| 156 | 926 Employee pensions and benefits | 6 342 239 | (737 551) |
| 157 | 927 Franchise requirements | — | — |
| 158 | 928 Regulatory commission expenses | 64 604 | (59 844) |
| 159 | 929 Duplicate charges—Cr. | ( 1 891 931) | (242 421) |
| 160 | 931.1 General advertising expenses | 35 910 | (10 459) |

## ELECTRIC OPERATION AND MAINTENANCE EXPENSES (Continued)

| Line No. | Account (a) | Amount for year (b) | Increase or decrease from preceding year (c) |
|---|---|---|---|
| 161 | ADMINISTRATIVE AND GENERAL EXPENSES (Continued) | $ | $ |
| 162 | 930.2 Miscellaneous general expenses Includes 930.3 | 3 354 865 | 935 728 |
| 163 | 931 Rents | 373 647 | (36 319) |
| 164 | Total operation | 22 714 058 | 1 594 225 |
| 165 | *Maintenance* | | |
| 166 | 932 Maintenance of general plant | 1 317 145 | 325 844 |
| 167 | Total administrative and general expenses | 24 031 203 | 1 920 069 |
| 163 | Total Electric Operation and Maintenance Expenses | 530 960 887 | 99 033 481 |

## SUMMARY OF ELECTRIC OPERATION AND MAINTENANCE EXPENSES

| Line No. | Functional Classification (a) | Operation (b) | Maintenance (c) | Total (d) |
|---|---|---|---|---|
| 169 | Power Production Expenses | $ | $ | $ |
| 170 | Electric Generation: | | | |
| 171 | Steam power | 318 720 936 | 13 823 196 | 332 544 132 |
| 172 | Nuclear power | 20 689 143 | 9 735 300 | 30 424 443 |
| 173 | Hydraulic—Conventional | — | — | — |
| 174 | Hydraulic—Pumped Storage | — | — | — |
| 175 | Other power | 43 447 138 | 3 195 689 | 46 642 827 |
| 176 | Other power supply expenses | 52 557 929 | — | 52 557 929 |
| 177 | Total power production expenses | 435 415 146 | 26 754 185 | 462 169 331 |
| 178 | Transmission Expenses | 2 937 407 | 3 161 705 | 6 099 112 |
| 179 | Distribution Expenses | 9 530 820 | 13 651 715 | 23 182 535 |
| 180 | Customer Accounts Expenses | 13 964 031 | — | 13 964 031 |
| 181 | Customer Service and Informational Expenses | 1 389 093 | — | 1 389 093 |
| 182 | Sales Expenses | 125 582 | — | 125 582 |
| 183 | Adm. and General Expenses | 22 714 058 | 1 317 145 | 24 031 203 |
| 184 | Total Electric Operation and Maintenance Expenses | 486 076 137 | 44 884 750 | 530 960 887 |

## NUMBER OF ELECTRIC DEPARTMENT EMPLOYEES

Number of electric department employees, payroll period ended 12/16/79

| | | |
|---|---|---|
| 1. | Total regular full-time employees | 3 891 |
| 2. | Total part-time and temporary employees | 307 |
| 3. | Total employees | 4 198 |

The data on number of employees should be reported for the payroll period ending nearest to October 31, or any payroll period ending 60 days before or after October 31.

If the respondent's payrools for the reported period include any special construction forces include such employees as part-time and temporary employees and show the number of such special construction employees so included.

The number of employees assignable to the electric department from joint functions of combination utilities may be determined by estimate, on the basis of employee equivalents. Show the estimated number of equivalent employees attributed to the electric department from joint functions.

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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**File No. PA-81-0008**

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In the Matter of

TELEPROMPTER CORPORATION and
TELEPROMPTER SOUTHEAST, INC.
*Complainants,*

v.

FLORIDA POWER CORPORATION
*Respondent.*

To: The Common Carrier Bureau

## RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the Complaint of Teleprompter Corporation and Teleprompter Southeast, Inc. ("Complainants") filed by Complainants on November 18, 1980.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises jurisdictional and constitutional objections to Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes

a number of procedural requests designed to conserve Commission resources and illuminate particular aspects of this controversy and possible remedies.

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainants and Respondent for the rental of pole space for cable television attachments. The rates established in that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainants and Respondent. The rental rate now in effect benefits Complainants greatly, for it is much lower than the annual costs they would incur if they owned their own pole system. Yet Complainants now ask the Commission to abrogate the contract and impose a rental rate far lower than the negotiated rate. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

**I. Answers to Allegations in Complaint**

1. Respondent lacks sufficient knowledge to respond to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint.

3. Respondent denies the allegations of paragraph 3 of the complaint.

4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of



Respondent's poles are used for wire communications, but many are not.

5. Respondent admits the allegation in paragraph 5 of the complaint that the Florida Supreme Court has held that regulation of pole attachments is outside of the Florida Public Service Commission's current jurisdiction. Respondent is without knowledge or information sufficient to form a belief as to the remainder of paragraph 5.

6. Respondent admits the allegations of paragraph 6 of the complaint.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent denies the allegations of paragraph 8 of the complaint. Rather than "attempting to charge" Complainants an annual rental of $6.24 per pole in 1980, Respondent charged that rate in 1980 and currently charges $6.51 per pole pursuant to contractual agreement with Complainants.

9. Respondent admits the allegations of paragraph 9 of the complaint, except for the allegation that Complainants sought to determine the "lawfulness" of Respondent's rate, which is denied.

10. Respondent denies the allegations of paragraph 10 of the complaint.

11. Respondent admits the first sentence of paragraph 11 of the complaint, except for the use of the term "maximum lawful rate," and denies the remainder of the paragraph.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint.

16. Respondent denies the allegations of paragraph 16 of the complaint.

17. Respondent denies the allegations of paragraph 17 of the complaint.

18. Respondent denies the allegations of paragraph 18 of the complaint.

19. Respondent denies the allegations of paragraph 19 of the complaint. Rather than "attempting to charge" Complainants a one-time rental rate of $16.50 per anchor attachment, Respondent currently charges that fee pursuant to contractual agreement.

20. Respondent admits the allegations in paragraph 20 of the complaint that the pole attachment agreement provides for annual rental increases and for a bonding payment. Respondent is without knowledge or information sufficient to form a belief as to the allegation that Complainants are established and reliable corporations. Respondent denies the remainder of paragraph 20.

21. Respondent denies the allegations of paragraph 21 of the complaint.

**II. Affirmative Defenses**

22. The Commission should not grant the relief requested because:

A. Congress did not grant the Commission authority to amend, modify or abrogate pole attachment contracts in existence prior to the effective date of the Communications Act Amendments of 1978, such as the agreement at issue between Complainants and Respondent.

B. The relief requested would constitute a taking of private property without just compensation



prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private property for a distinct and heretofore unregulated business purpose.

C. The relief requested would retroactively nullify the terms of a contract in existence prior to the effective date of the Communications Act Amendments of 1978, and thereby would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

As discussed in paragraph 41 below, Respondent requests that a briefing schedule be set for each of the above defenses.

**III. Calculation of Pole Attachment Rates and Conditions**

23. Notwithstanding Respondent's overriding objections to Complainants' request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with the Commission guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

24. Attached hereto as Exhibit A is the Affidavit of Gary E. Clayton, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The rate derivation methodology explained in detail in the Affidavit differs in only a few respects

from the methodology used in the complaint. Actual figures used differ in many instances because of Respondent's access to more specific and more recent historic figures. The variations from Complainants' methods and figures have resulted in rate components both more and less favorable to Respondent than those presented in the complaint.

25. Like Complainants, Respondent begins its rate calculation with gross pole investment. Where Complainant uses the figure reported on Respondent's Annual Report to the Federal Energy Regulatory Commission ("FERC Form 1") for the year ending December 31, 1979, Respondent uses the more recent, though still historic, figure which will appear on the FERC Form 1 for the year ending December 31, 1980. Complainants then arrive at net investment by subtracting a depreciation reserve figure derived from total plant statistics. Respondent instead subtracts the actual pole depreciation reserve figure on its books as of December 31, 1980. See Affidavit paragraph 7.

26. Complainants adjust the net pole investment figure by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. 224(d)(1) speaks of costs "attributable to the entire pole," not to the "bare pole." Respondent for the purpose of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia*, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.



27. Unable to take the next step in the analysis, the division of net pole investment by the number of poles owned by Respondent, Complainants assume that Respondent's net investment per pole is no greater than that of the General Telephone Company of Florida. This assumption results in Complainants' use of the grossly inaccurate figure of $57.18. By dividing net investment by the actual number of poles owned, 524,044, Respondent arrives at a net investment per pole of $96.75. See Affidavit paragraph 8.

28. Complainants and Respondent look at the same components in calculating carrying charges: cost of capital, maintenance expenses, administrative expenses, depreciation and taxes.

29. Complainants simply estimate the cost of capital at 10%. Respondent instead calculates the actual cost of capital in compliance with the Florida Public Service Commission method. See Affidavit paragraph 10.

30. Complainants begin their calculation of maintenance expenses with the FERC 593 (overhead lines maintenance) account reported in Respondent's FERC Form 1 for the year ending December 31, 1979. Respondent instead uses the FERC 593 account which will appear on the FERC Form 1 for the year ending December 31, 1980. To express maintenance expenses as a percentage of gross investment, Complainant divides the FERC 593 account by the FERC 364 (poles, towers and fixtures) account. Respondent matches expenses to plant more precisely by dividing the FERC 593 account by both the FERC 364 and the FERC 365 (overhead conductors and devices) accounts. Where Complainants' method results in a maintenance expenses rate for gross investment of 11.89%, Respondent's method results in a rate of 6.35%. To convert maintenance expenses from a percentage of gross pole investment to a percentage of net pole investment, Complainants use the same gross pole investment and pole depreciation reserve

figures used in calculating net pole investment. As explained in paragraph 25 above, Respondent uses more recent and directly relevant figures. Respondent arrives at a maintenance expenses rate for net investment of 9.48%. Had Respondent divided the FERC 593 account by the FERC 364 account alone, the maintenance expenses rate for net investment would have been 17.7%. See Affidavit paragraph 11.

31. Like Complainants, Respondent begins the calculation of pole administrative expenses by assuming that these expenses bear the same relation to pole investment as plant administrative expenses bear to total plant investment. However, Respondent's calculations differ from Complainants' in two ways. First, Respondent again uses updated statistics, in this case the plant administrative expenses and plant investment figures which will appear on the FERC Form 1 for the year ending December 31, 1980. Second, Respondent uses gross pole investment and net pole investment figures to convert administrative expenses from a percentage of gross investment to a percentage of net investment. Respondent makes assumptions based on total plant statistics only when necessary: since the ratio of gross pole investment to net pole investment is available, Respondent uses that ratio as a conversion factor. See Affidavit paragraph 12.

32. Respondent uses the same formula as the Complainants for deriving the depreciation rate for gross investment. Where Complainants assume a useful life of 30 years, however, Respondent applies the 22 year average life authorized for FERC account 364 by the Florida Public Service Commission. Again, Respondent uses more recent and directly relevant gross pole investment and net pole investment figures than those found in the complaint. See Affidavit paragraph 13.

33. Complainants calculate taxes as a percentage of net investment in the same way as they calculate administrative expenses. Similarly, Respondent calculates taxes other than state and federal taxes in the same way as it calculates administrative expenses. The differences between the two approaches have been explained in paragraph 31 above. See Affidavit paragraph 15.



34. Respondent's method of calculating state and federal income taxes departs entirely from the Complainants' tax calculation method. Respondent's methodology is in accordance with the methodology used by the Florida Public Service Commission, and avoids the often misleading results of the Complainants' method. Explained in many sources, including American Telephone and Telegraph Company, *Engineering Economy*, 174-79 (3d ed. 1977), Respondent's methodology is conceptually similar to the approach accepted in another pole attachment proceeding, *TeleCable Development Corporation v. Appalachian Power Company*, No. 79-0007, ¶ 19 (Common Carrier Bureau, October 31, 1980). See Affidavit paragraph 14.

35. Respondent's calculations result in a net investment per pole of $96.75 and carrying charges of 33.7%. To complete the calculation, the additional factor of usable space attributable to cable use must be supplied.

The Commission has ruled that cable uses no more than 1 foot of space, and that usable space must include all safety spaces between users. It is respectfully submitted that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable.[1] As paragraphs 20 and 21 of the Affidavit

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[1] Respondent notes the particular injustice of Commission reliance on agreements which "generally make the CATV operators responsible for all pole replacement costs necessitated by subsequent installation of additional electric or telephone lines that reduce available safety space to less than 40 inches." *Adoption of Rules for the Regulation of Cable*

show, if the Complainants owned their own pole system they would incur considerably higher annual costs—even if they shared those costs with another user—than they now pay Respondent. Where more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainants a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, therefore, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage.

36. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.42, as compared to the $1.38 requested by the complaint.

37. An annual rate of $9.63 per pole would be a just and reasonable charge for Complainants' use of Respondent's poles. Respondent has developed this rate by positing the existence of a pole system owned by Complainants and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. Assuming that Complainants could find another user to share pole costs equally, Complainants would pay an annual rate of $9.63 per pole if they owned their own pole system. See Affidavit paragraphs 20-21. That Complainants now pay a far lower rate under the terms of the agreement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainants' request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility customers to share in the savings Complainants derive from using Respondent's pole system rather than maintaining their own.

*Television Pole Attachments*, 72 F.C.C.2d at 71. Respondent's contractual agreements with Complainants contain no such provisions.



38. Because an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility," the Commission does not have jurisdiction under 47 U.S.C. § 224 to pass upon Complainants' challenge of the reasonableness of Respondent's anchor attachment rates. Nonetheless, Respondent feels compelled to remark on the irony of Complainants' questioning of anchor attachment rates. As the Affidavit states, Respondent rents anchors to Complainants only because the unauthorized and potentially unsafe use of anchors by Complainants left Respondent no choice aside from forcible removal. Respondent would be pleased to relieve Complainants of this "onerous" charge by ceasing rental of anchors to CATV companies.

39. As exemplified by the Complainants' unauthorized use of Respondent's anchors, the history of Respondent's dealings with CATV companies shows the bonding payment required of such companies to be just, reasonable, and essential.

**IV. Procedural Requests**

40. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the U.S. Court of Appeals for the D.C. Circuit has entered a decision on the pending appeal, Nos. 80-1483, 80-1490, 80-1499, of the Commission's *Adoption of Rules for the Regulation of Cable Television Pole Attachments, supra*. Like this response, the appeal of the Commission's Rules has focused upon the Commission's assertion of jurisdiction to abrogate pre-existing pole attachment agreements and determination that the CATV operator may be charged with only one foot of pole space. Should the D.C. Circuit find merit in the appeal, a previous disposition of the instant complaint would stand to be largely superseded

or entirely invalidated. A stay therefore would avoid needless waste of the Commission's resources. Upon Commission grant of a stay, the Respondent will reserve sufficient funds to meet the relief requested by the complaint.

41. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the Florida legislature has acted upon a bill which would grant the Florida Public Service Commission authority to regulate pole attachments. Such a bill will be filed with the Florida legislature within the next month for consideration at its next session. Passage of this legislation, followed by Florida Public Service Commission certification to the Federal Communications Commission, would leave the latter without jurisdiction to enforce any relief ordered in response to the complaint. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, *supra*, 73 F.C.C.2d at 61. Rather than risk such a waste of its time and effort, the Federal Communications Commission should await the Florida legislature's decision. No harm would come to Complainants because Respondent would reserve funds as described in paragraph 40.

42. Respondent requests a briefing session for the presentation of arguments supporting the legal points stated in paragraph 22. Points B and C have not been brought before the Commission in previous pole attachment proceedings. Respondent also stands ready to brief Point A.

43. Respondent requests an evidentiary hearing on the question of the applicability of 47 U.S.C. § 224 and Sections 1.1401-.1415 of the Commission's rules to anchor attachments. Respondent submits that an anchor attachment is not an "attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

44. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the several remedies requested by Complainants. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the few pole attachment complaints it has decided. *See, e.g., Telepromp-ter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," § 1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. § 224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. 1st Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainants without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainants' business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to gauge accurately the likely public benefits, if any, of the remedies sought by Complainants.



45. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainants' cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainants would not merely be profit for Complainants, but might also be passed on to Complainants' customers.

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL
ALLAN J. TOPOL

/s/ MICHAEL S. BERNSTEIN
MICHAEL S. BERNSTEIN

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

*Attorneys for Respondent*

*Of Counsel*

Office of the General Counsel
HARRY A. EVERTZ III
Senior Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733

January 21, 1981



STATE OF FLORIDA )
COUNTY OF PINELLAS )

**File No. PA-81-0008**

## AFFIDAVIT OF GARY E. CLAYTON

BEFORE ME, the undersigned authority, on this day personally appeared GARY E. CLAYTON, who, after being sworn, deposes and says:

1. My name is Gary E. Clayton. My business address is 3701 34th Street South, St. Petersburg, Florida. I am the Manager for Liaison and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Electrical Engineering from the Georgia Institute of Technology, Atlanta, Georgia. I have been employed by Florida Power for the past ten years. My experience in that time has included two years in the area of distribution engineering, five years in the area of transmission engineering, and three years in my present position in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with (a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and (b) the Complaint filed by Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter") against Florida Power, File No. PA-80 ____. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.42. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $9.63. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 524,044 poles as of November 30, 1980. Its tabulation of poles as of December 31, 1980 has not yet been concluded. Net investment per pole, expressed as the quotient of net investment divided by the number of poles owned by the Florida Power Corporation, was $96.75.



$$\frac{\text{Net Pole Investment}}{\text{Number of Poles}} = \$96.75 = \text{Net investment per pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by Florida Public Service Commission method. The figure includes a debt component (long term debt and customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

| Return (Cost of Capital) | % of Capital | | Cost of Capital |
|---|---|---|---|
| Long-term Debt | .4567 | at | 8.81% |
| Preferred Stock | .1086 | at | 8.30% |
| Common Stock | .2929 | at | 14.6 % |
| Cost Free Deferred Tax Credits | .1280 | at | 0 % |
| Customer Deposits—Active | .0136 | at | 8 % |
| Customer Deposits—Inactive | .0002 | at | 0 % |
| Composite Cost of Capital | | | 9.31% |

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross investment in the FERC 364 and 365 accounts and mul-

tiplied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364 \& 365 accounts}} = \frac{\$10,581,432}{\$166,512,636} = 6.35\% = \text{Maintenance expense rate for gross investment}$$

$$6.35\% \times 1.4917 = 9.48\% = \text{Maintenance expense rate for net investment}$$

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29,943,156}{\$2,073,396,138} = 1.44\% = \text{Administrative expense rate for gross investment}$$

$$1.44\% \times 1.4917 = 2.15\% = \text{Administrative expense rate for net investment}$$

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.



$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the returr [*sic*] of the required return on capital has been reduced by including the interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method, and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio = .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = Capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \frac{(.487)}{(1 - .487)} \left(1 - \frac{(.4703)\ (8.79)}{(9.31)}\right) ((\text{A/P}, 9.31\%\ 22\ \text{Years}) - 0.455))$$

Income Tax = 3.32%

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely

of property taxes and gross receipts taxes, which will be reported on account 408.10 of the FERC Form 1 of 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

$$\frac{\text{Other taxes (except for franchise fees)}}{\text{Gross Plant Investment}} = \frac{\$36,940,257}{\$2,078,396,138} = 1.78\%$$

= Other tax rate for gross investment

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 33.70%, equal the sum of the individual components derived above in paragraphs 10-15:

| | % of Net Pole Cost |
|---|---|
| Return (Cost of Capital) | 9.31 |
| Maintenance Expenses | 9.48 |
| Administrative Expenses | 2.15 |
| Depreciation | 6.79 |
| Federal & State Income Taxes | 3.32 |
| Other Taxes | 2.65 |
| Total | 33.70 |

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$96.75 x 33.7% = $32.60 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.42.

19. The present pole attachment rate of $6.51 is fair and just. It is much lower than the annual pole cost Teleprompter would incur if it owned its own pole system.



20. It is reasonable to assume that a Teleprompter-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. Exhibit C, paragraph 2 of the Complaint shows a General Telephone Company of Florida net investment per pole of $57.18. The carry costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for a Teleprompter-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for a Teleprompter-owned system of $19.27.

$57.18 x 33.7% = $19.27

21. If Teleprompter were to share equally the cost of its pole system with another user, the annual cost for each party would be $9.63, still well above the rate Teleprompter pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Teleprompter less than half of the rate Teleprompter would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Teleprompter's anchor attachments are not attachments to poles, ducts, conduits or rights of way owned or controlled by Florida Power.

24. For safety reasons, Florida Power does not encourage the use of its anchors by CATV companies. After discovering more than 1000 unauthorized Teleprompter anchor attachments, Florida Power reached a contractual agreement for anchor rentals as an alternative to forcibly removing the attachments.

25. Florida Power requires bonding payments from all cable companies renting pole attachments. Past experience with such companies proves the necessity for the protection bonding payments provide.

Signed this 16th day of January, 1981.

/s/ GARY E. CLAYTON
GARY E. CLAYTON

Sworn to and subscribed before me
this 16th day of January, 1981.

/s/ Illegible
Notary Public

My Commission Expires:
June 15, 1982



## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response" have been mailed, postage prepaid, this 21st day of January, 1981, to the following:

GARDNER F. GILLESPIE, ESQ.
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006
Attorney for Complainants

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ MICHAEL S. BERNSTEIN
MICHAEL S. BERNSTEIN

January 21, 1981

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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**File No. PA-81-0023**

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In the Matter of

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE,
Complainant,

v.

FLORIDA POWER CORPORATION,
Respondent.

TO: The Common Carrier Bureau

## COMPLAINT

**Parties**

1. Complainant Acton CATV, Inc. d/b/a Brooksville Properties Venture and Pasco Associates Venture owns and operates the cable television systems presently serving the communities of Brooksville and Pasco County, Florida. The address of Acton CATV, Inc.'s headquarters is One Acton Place, Acton, Massachusetts 01720.

2. Respondent Florida Power Corporation is engaged in the provision of electrical service in portions of the State of Florida. Respondent's general office is P.O. Box 33101, St. Petersburg, Florida 33733.

**Jurisdiction**

3. This Commission has jurisdiction over this complaint and over Respondent under the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, including, but not limited to, Section 224 thereof.



4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainant alleges, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainant alleges, upon information and belief, and in reliance upon lists published by the Commission pursuant to 47 C.F.R. § 1.1414(b), that neither the State of Florida nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulates the rates, terms, or conditions of pole attachments.

**Service**

6. Attached hereto is a certificate of service on the Respondent and each federal, state, and local agency which regulates any aspect of service provided by Respondent.

**Agreement**

7. Complainant has entered into agreement with Respondent whereby it was agreed that space would be made available on Respondent's poles in and in the vicinities of Brooksville and Pasco County, Florida for pole attachments as defined in 47 C.F.R. § 1.1402(b). Those Agreements, dated June 16, 1980, are attached hereto as Exhibits A and B. Pursuant to those agreements, Complainant is charged an annual rental of $7.15 per pole. Exhibit A at Section 7.1; Exhibit B at Section 7.1. As of November, 1980, there were 5,080 (Brooksville—988; Pasco County—4,092) Florida poles subject to the two Agreements.

**Unjust and Unreasonable Rate**

8. Respondent is thus currently attempting to charge Complainant an annual rate of $7.15 per pole in areas

presently served. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Commissions Act and Section 1.1409(c) of the Commission's Rules and Regulations, the maximum lawful rate Respondent may charge is $2.23.

9. In order to determine the lawfulness of Respondent's rate, Complainant relies to some extent on data set forth in the affidavit of Gary E. Clayton, which is appended to the Response of Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc. v. Florida Power Corporation*, File No. PA-81-0008. That Response, dated January 21, 1981, is attached hereto as Exhibit C. Complainant also relies, as indicated herein, on publicly available data in Respondent's 1979 Annual Report to the Federal Energy Regulatory Commission (FERC), Form 1.

10. By statute, the maximum lawful rate is determined by multiplying the "revenue requirement" of each pole (*i.e.*, the operating expenses and capital costs attributed to each bare pole installed) times the "use ratio" for cable television (*i.e.*, the percentage of total usable space occupied by the pole attachment). These figures are developed in summary form in Exhibit D, and they are explained herein.

11. The first step in determining the maximum lawful rate is the calculation of the annual revenue requirement per bare pole. This annual revenue requirement consists of the product of the net investment per bare pole times the annual carrying charges attributable to each pole.

12. The net investment in poles consists of the difference of the gross pole investment and the pole depreciation reserve, and the net investment in bare poles is obtained by reducing this figure by 15 percent in order to remove net investment in crossarms and other equipment not used or useful for pole attachments. The net investment in bare poles, in turn, must be divided by the number of poles



owned by Respondent in order to yield the net investment per bare pole. For purposes of calculation, Complainant will rely on Respondent's figures in Exhibit C. The calculations are set forth in Exhibit D.

13. In order to calculate the revenue requirement per pole, the net investment in each must be multiplied by an annual carrying charge, which consists of all operating expenses and capital costs properly attributable to such poles. Both the Congress and the Commission have determined that the carrying charge includes maintenance expenses, depreciation, administrative expenses, taxes, and cost of capital. Sen. Rep. 95-580, 95th Cong. 1st Sess. 20 (1977); *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C.2d 232 (1980).

14. The maintenance expenses, expressed as a percentage of net investment in poles, may be obtained by dividing the pole and conductor maintenance expenses by the net pole investment plus net conductor investment. For purposes of calculation Complainant relies on Respondent's pole and conductor maintenance expense as set forth in Exhibit C. Net pole investment consists of the difference of gross pole investment minus pole depreciation reserve, and net conductor investment consists of the difference of gross conductor investment minus conductor depreciation reserve. The calculations, which yield 8.69%, are set forth in Exhibit D.

15. Assuming, as Respondent indicates in Exhibit C, that the average useful life of a utility pole is 22 years, the depreciation rate, as adjusted for application to net investment, is 6.79%. *See* Exhibit D. With regard to administrative expenses, Complainant relies for purposes of calculation on Respondent's figure for total expenses as set forth in Exhibit C. The calculations, which yield 1.8%, are set forth in Exhibit D. The taxes paid, as indicated

in Respondent's FERC Form 1, are expressed as a percentage of net plant investment, 4.51%.

16. As set forth in Exhibit C, Respondent's figure for composite cost of capital is 9.31%. Adding this figure to the other elements of the annual carrying charge yields a sum of 30.10%. *See* Exhibit D. The product of this figure times the net investment per bare pole constitutes the revenue requirements per bare pole.

17. To calculate what share of that revenue requirement Respondent may charge to cable systems, it is necessary to determine two factors: the space used for a cable attachment and the average usable space per pole. As the Commission has found, there is no dispute that a CATV cable actually uses or occupies one foot of space. *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C.2d 59, 70 n.26 (1979), *aff'd on reconsideration*, 77 F.C.C.2d 187, 190 (1980). No safety zones or other clearances may properly be assigned to the cable operator. 72 F.C.C.2d at 70. Dividing the space occupied by the cable attachment, one foot, by the total usable space, 13.5 feet, yields a use ratio of 1/13.5, or 7.41%. This figure is the same as that used by Respondent in Exhibit C.

18. Therefore, multiplying the net investment per bare pole ($96.75) times the annual carrying charge (30.10%) times the use ratio (7.41%) yields the maximum lawful rate ($2.23) permissible under 47 U.S.C. § 224(d)(1). *See* Exhibit D. Any rate charged by Respondent in excess thereof is unjust and unreasonable and therefore unlawful.

19. As set forth above, and as reflected in the pole agreement attached as Exhibit A, Respondent presently charges a rate of $7.15. Complainant submits that such a rate is unlawful in that it exceeds the calculated maximum lawful rate of $2.23.



**Unreasonable Terms and Conditions**

20. Respondent also has attempted to impose unreasonable and illegal terms and conditions on Complainant in Respondent's pole attachment agreements. The agreements require Complainant to "furnish bond . . . to guarantee the payment of any sums which may become due . . .," and the amount of coverage required could rise to as much as $100,000.00. Exhibit A, Section 5.3; Exhibit B, Section 5.3. This bonding requirement is onerous and unnecessary, both because Complainant is an established and reliable corporation and because the semiannual payments under the agreements must be made in advance. Exhibit A, Section 7.1; Exhibit B, Section 7.1.

**Relief Requested**

21. Complainant respectfully requests that:

(a) the Commission determine that the maximum rate Respondent may lawfully charge is $2.23 per pole per year;

(b) the present rates, being in excess thereof, be terminated pursuant to 47 C.F.R. § 1.1410(a);

(c) the Commission, pursuant to 47 C.F.R. § 1.1410(b), substitute an annual rate of $2.23 per pole in the agreements attached hereto as Exhibits A and B;

(d) Respondent be ordered, pursuant to 47 C.F.R. § 1410(c) to refund to Complainant the amounts Complainant has paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.

Respectfully submitted,

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE

By /s/ Gardner F. Gillespie
Gardner F. Gillespie

By /s/ Paul Glist
Paul Glist

By /s/ Daniel R. White
Daniel R. White

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
Its Attorneys

Dated: February 20, 1981



**AFFIDAVIT**

STATE OF MASSACHUSETTS )
COUNTY OF MIDDLESEX ) SS:

I, Ronald A. Mahon, an officer of Acton CATV, Inc., on oath do state that I have read the foregoing Complaint attached hereto; that I am familiar with the matters contained herein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

/s/ RONALD A. MAHON

Subscribed and sworn to before me
this 17th day of February, 1981.

/s/ Illegible [SEAL]
Notary Public

My commission expires:
September 28, 1984

## ATTACHMENT AGREEMENT
## BETWEEN
## FLORIDA POWER CORPORATION
## AND
## ACTON CATV, INC. d/b/a
## BROOKSVILLE PROPERTIES VENTURE

*SECTION 0.1* THIS AGREEMENT, made and entered into this 16th day of June, 1980, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and Acton CATV, Inc. d/b/a Brooksville Properties Venture, organized and existing under the laws of the State of Massachusetts, herein referred to as the "Television Company".

**WITNESSETH:**

*SECTION 0.2* WHEREAS, the Television Company proposes to furnish cable television distribution service in corporate limits of Brooksville and adjacent areas lying in Sections 14, 15, 16, 21, 22, 23, 26, 27 and 28; Township 22 South, Range 19 East, Hernando County, Florida. [*sic*] and will need to erect and maintain aerial cables, wires and associated appliances throughout the areas to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

*SECTION 0.3* WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

*SECTION 0.4* NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto mutually covenant and agree as follows:

**EXHIBIT A**



## ARTICLE I

## SCOPE OF AGREEMENT

*SECTION 1.1* This agreement shall be in effect in the portions of counties described in Section 0.2 above in which the Electric Company provides electric distribution service.

*SECTION 1.2* The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

*SECTION 1.3* Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

## ARTICLE II

## PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

*SECTION 2.1* Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefor in the form of Exhibit A, attached hereto and made a part hereof. Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit A.

*SECTION 2.2* The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company, and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the non-betterment expense thereby incurred. Nothing in this Section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

*SECTION 2.3* The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National Electrical Safety Code, or any amendments or revisions of said specifications or code. Drawings marked 1-G-1, 1-H, 1-H-1, 1-I, 1-I-1, 1-J, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of min-



imum required construction under some typical conditions, and will be amended as related Electric Company specifications are changed.

*SECTION 2.4* In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric

Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

*SECTION 2.5* The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

*SECTION 2.6* The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.



## ARTICLE III

## EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

*SECTION 3.1* Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communication Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

## ARTICLE IV

## RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

*SECTION 4.1* It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30) days' notice in writing to the Television Company, require

the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

## ARTICLE V
## INSPECTION

*SECTION 5.1* The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections, semiannually or more often [*sic*] as plant conditions must warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

*SECTION 5.2* Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

*SECTION 5.3* The Television Company shall furnish bond issued by a corporate surety acceptable to the Electric



Company to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections, or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions, as provided on the attached Schedule of Required Bond Coverage. The Schedule of Required Bond coverage may be subject to revision by the Electric Company from time to time to be consistent with any increases in construction costs or rental attachment rates. The Electric Company will give the Television Company ninety (90) days notification prior to the effective date of any such Schedule revision.

## ARTICLE VI
## ABANDONMENT AND REMOVAL OF ATTACHMENTS

*SECTION 6.1* The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

*SECTION 6.2* Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.

## ARTICLE VII
## RENTAL AND PROCEDURE FOR PAYMENTS

*SECTION 7.1* The Television Company shall pay to the Electric Company, for attachments made to poles under

this agreement, a rental at the rate of ($7.15) Seven Dollars and 15/100 per pole per year. Said rental shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semiannual payments. The first payment of rental hereunder shall include such prorated amount as may be due for use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective.

*SECTION 7.2* If the Electric Company decides to make a field inspection of the entire plant of the Television Company in accordance with Section 5.1 of this Agreement and, further, if the Electric Company finds that the attachment inventory records are in error, then upon completion of such inventory, the office records will be adjusted accordingly and subsequent billing will be based on the adjusted number of attachments. The corrections to the estimations made over the years elapsed since the preceding inventory shall be prorated equally (*i.e.*, if the latest joint field check shows 100 more CATV attachments than office records indicate and if the interval since the last joining field check is 5 years, then each of the intervening annual pole inventory amounts would be adjusted upward by 20 poles). In calculating retroactive billing for the years elapsed since a preceding inventory, full consideration will be given for the cost of money, as experienced by the Electric Company, over that period of time. The prime annual interest rate used in calculating the annual cost of money will be determined by using average annual interest rate, + 2%, for the 7 Southeast centers, Bank rates on short-term business loans, money and interest rates, *Survey of Current Business*, as published by the United States



Department of Commerce/Social and Economic Statistics Administration/Bureau of Economic Analysis.

*SECTION 7.3* If for any reason the Television Company is delinquent in the payment of any billings as herein provided by this contract and upon 30 days after receipt of an invoice from Electric Company, the Electric Company can, at its option, charge the Television Company prime annual interest as defined in the aforementioned Section 7.2.

## ARTICLE VIII

## PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

*SECTION 8.1* The attachment rate set forth in Section 7.1 shall be subject to annual revision at the request of either party made in writing to the other not later than sixty (60) days before the anniversary date of this agreement. If the parties hereto fail to agree upon a revision of such rate prior to said anniversary date, the then attachment rate for each subsequent annual period until further revised, shall be an amount equal to one-half of the current annual cost of installing and maintaining an average attachment pole.

*SECTION 8.2* Current annual cost as referred to in Section 8.1 refers to the current carrying charges which would be experienced by the Electric Company by owning, installing and maintaining an average attachment pole and is arrived at by using current costs to install an average attachment pole and then applying a percentage (a fixed charge rate which includes all related costs associated with ownership thereto covering current fixed charges).

*SECTION 8.3* An average attachment pole, as referred to in Sections 8.1 and 8.2, is defined to mean the average of a 35-foot and 40-foot pole.

## ARTICLE IX
## DEFAULTS

*SECTION 9.1* If the Television Company shall fail to comply with the provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles and, if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles to which such default or non-compliance shall have occurred. In case of such termination, no refund or prepaid rentals shall be made.

## ARTICLE X
## LIABILITY AND INSURANCE

*SECTION 10.1* The Television Company shall assume full responsibility for the attachment of its facilities pursuant to this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence,



the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person and or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, disposition of injured or deceased person.

*SECTION 10.2* As a safeguard in respect of Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence and $200,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form 908-404(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.

*SECTION 10.3* The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company is further hereby

advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and the safety measures to be taken in connection t rewith; and during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees and of the general public against all hazardous or dangerous conditions as the same arise.

*SECTION 10.4* The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place to work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In



the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-enerization [*sic*] of such conductors or other equipment, and without making any changes whatsoever at the job site.

## ARTICLE XI

## EXISTING RIGHTS OF OTHER PARTIES

*SECTION 11.1* Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto. However, under no circumstances will the Electric Company grant permits permitting more than one attachment for cable television distribution service to any pole or pole line.

## ARTICLE XII

## TERM OF AGREEMENT

*SECTION 12.1* This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 9.1 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time thereafter by giving to the other party at least a six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so

removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company, or the bonding company, any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

## ARTICLE XIII

## ASSIGNMENT OF RIGHTS

*SECTION 13.1* The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

*SECTION 13.2* No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere revocable license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny licensing of any poles to the Television Company for any reason whatsoever (within the sole discretion of the Electric Company).

## ARTICLE XIV

## WAIVER OF TERMS OR CONDITIONS

*SECTION 14.1* Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.



## ARTICLE XV

## BONDING TO ELECTRIC COMPANY GROUND

*SECTION 15.1* For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

*15.1.1* "Vertical ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

*15.1.2* "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

*15.1.3* "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

*SECTION 15.2* At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists. Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.

*SECTION 15.3* Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

*SECTION 15.4* The Electric Company reserves the right to install a "bonding wire" to any piece of television equip-

ment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

*SECTION 15.5* It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

## ARTICLE XVI

## AUTOMATIC TERMINATION

*SECTION 16.1* Notwithstanding the provisions of Section 12.1 of this agreement; it shall be automatically terminated on x x x x x x x x, 19xx, in the event that the Television Company shall fail to commence making cable attachments on or before that date; it shall be automatically terminated on x x x x x x x x, 19xx, in the event that the Television Company shall fail to provide television distribution service throughout the area described in Section 0.2 of this agreement on or before that date; it shall be automatically terminated upon expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect.

Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.



## ARTICLE XVII

## MISCELLANEOUS PROVISIONS

*SECTION 17.1* Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

*SECTION 17.2* Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States, which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

*SECTION 17.3* Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

## ARTICLE XVIII

## EXISTING CONTRACTS

*SECTION 18.1* This agreement supersedes the existing agreement entered into between the two parties on the x x x day of x x x x x, 19xx.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.

Attest:

FLORIDA POWER CORPORATION

/s/ BETTY M. CLAYTON
Asst. Secretary

By /s/ NED B. SPARKE
Vice President

ACTON CATV, INC. d/b/a BROOKSVILLE PROPERTIES VENTURE

Attest:

/s/ Illegible
Asst. Secretary

By /s/ Illegible
Vice President



## SCHEDULE OF REQUIRED BOND COVERAGE

| NUMBER OF ATTACHMENTS | AMOUNT OF COVERAGE |
|---|---|
| 0 - 500 | $ 5,000 |
| 501 - 1,000 | 10,000 |
| 1,001 - 2,000 | 20,000 |
| 2,001 - 3,000 | 30,000 |
| 3,001 - 4,000 | 40,000 |
| 4,001 - 5,000 | 50,000 |
| 5,001 - 6,000 | 60,000 |
| 6,001 - 7,000 | 70,000 |
| 7,001 - 8,000 | 80,000 |
| 8,001 - 9,000 | 90,000 |
| Over 9,000 | 100,000 |

**EXHIBIT A**

**ATTACHMENT RENTAL CONTRACT**

**AND**

**FLORIDA POWER CORPORATION**

**Application and Permit**

_____, 19____

_____

In accordance with the terms of agreement dated ____ , 19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s _____ .

Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit," shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By _____

Title _____

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $_____, payable in advance.



Permit denied under Section 13.2, _____, 19____.

The above changes and rearrangements approved ____, 19____, and advance payment therefor enclosed.

By _____

Title _____

Permit Approved _____ By _____ ,
19_____
Permit No. _____
Total Previous Attachments _____
Attachments This Permit _ Title _____
New Total _____

# EXHIBIT B

## ATTACHMENT RENTAL CONTRACT

## AND
## FLORIDA POWER CORPORATION

### Notification of Removal by Television Company

_____, 19____

_____

In accordance with the terms of the agreement dated _____, 19____, kindly cancel from your records the following poles covered by Permit No. _____, from which attachments were removed on ____, 19___.

Location: City _____ County _____, Florida.

| Pole Number | Permit No. | Pole Location |
|---|---|---|

By _____

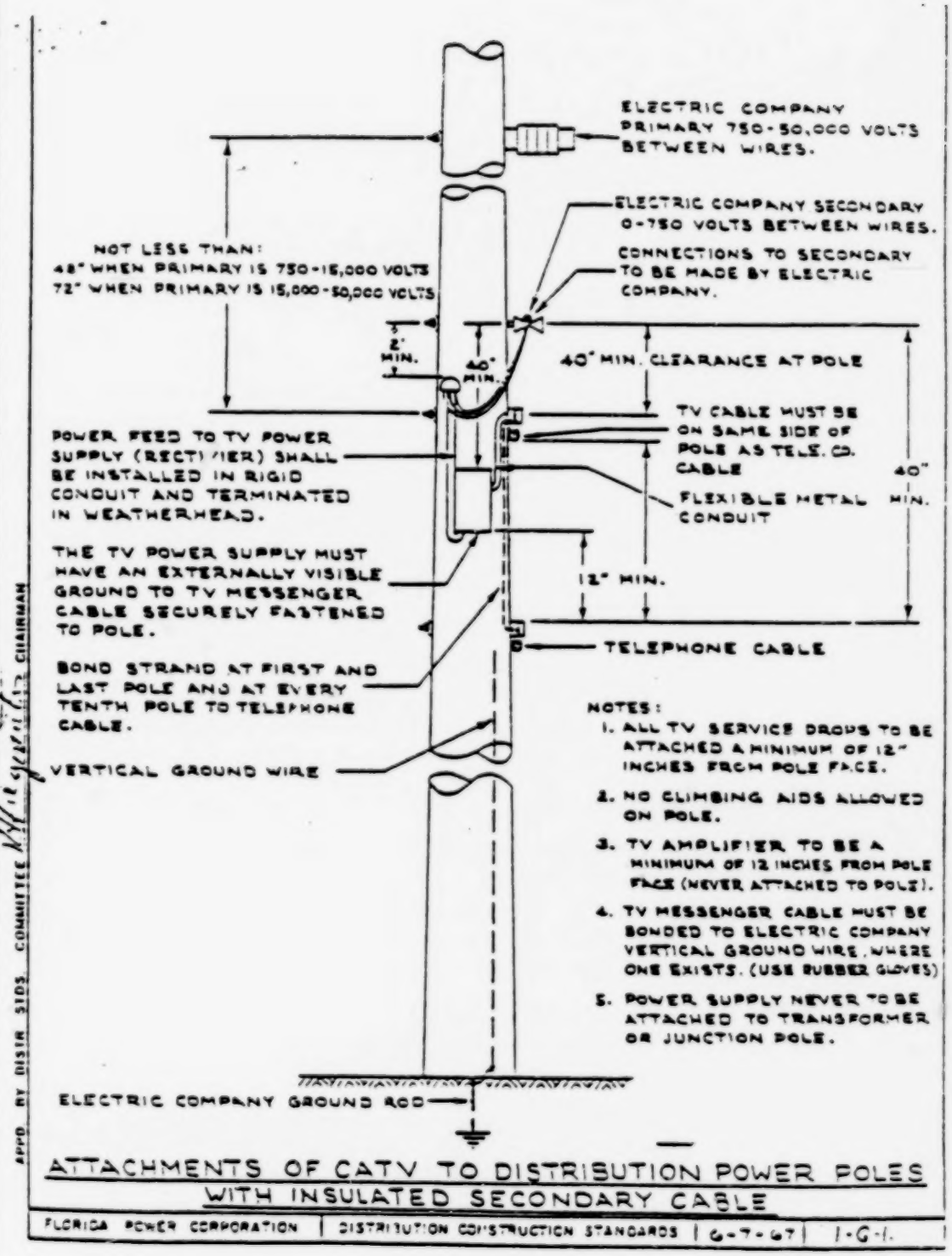
Title _____

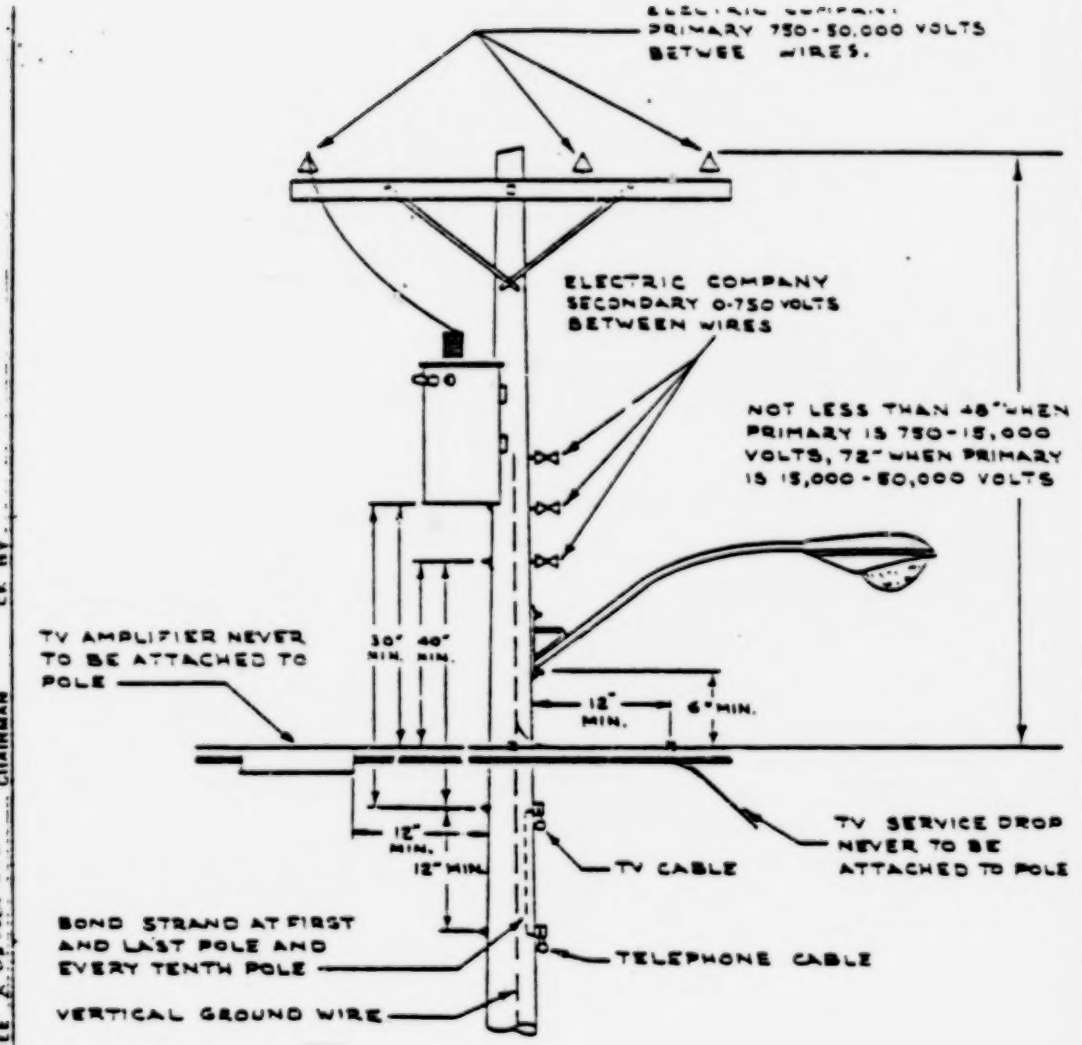
Notice Acknowledged By _____

_____, 19____ Title _____

Notice No. _____







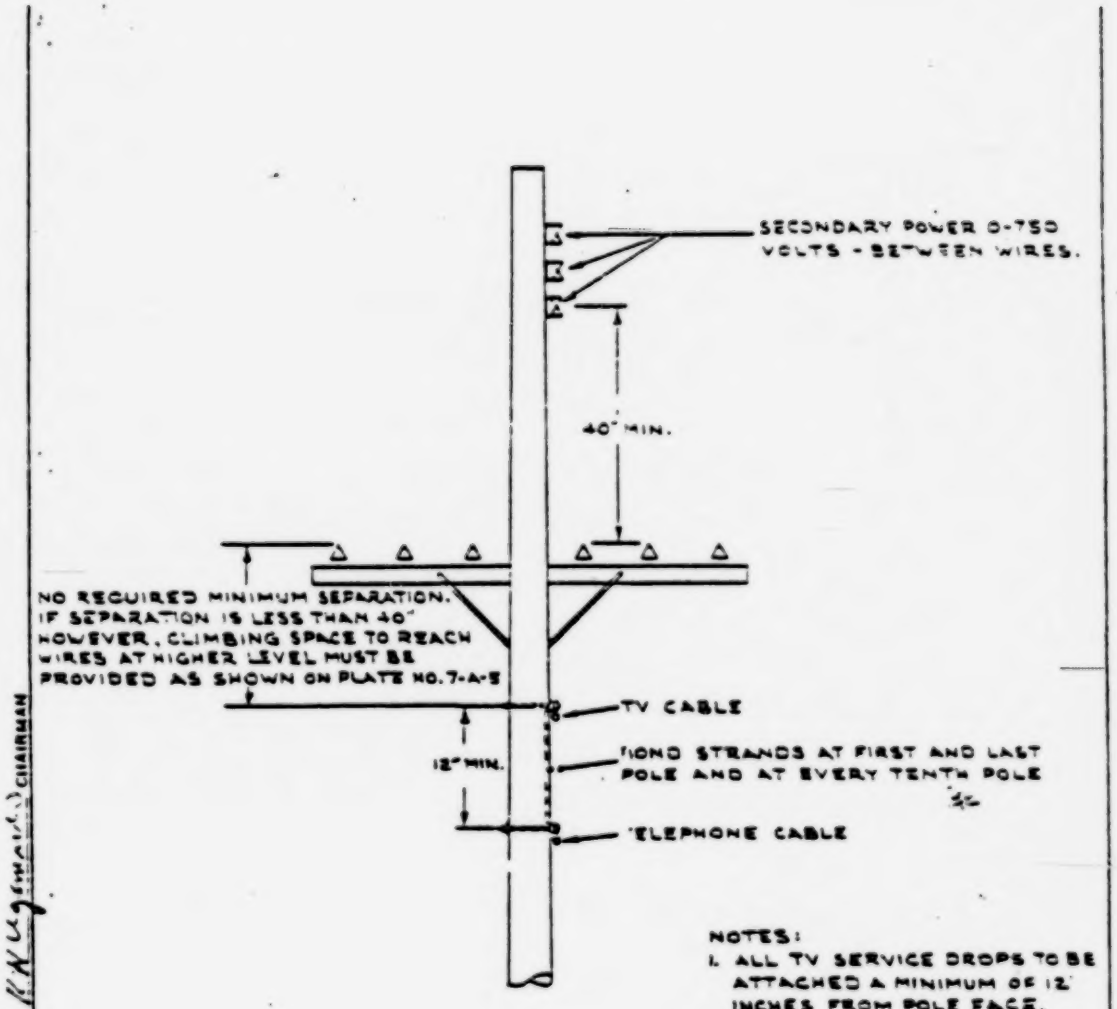

1. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES), ( DO NOT CUT WOOD MOLDING)
2. NO CLIMBING AIDS ALLOWED ON POLE.
3. POWER SUPPLY NEVER TO BE ATTACHED TO TRANSFORMER OR JUNCTION POLE.

APPD. BY DIST. STDS. COMMITTEE ..... CHAIRMAN ..... CK. BY .....

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH BARE SECONDARY CONDUCTORS

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 5-9-72 | 1-H |
|---|---|---|---|



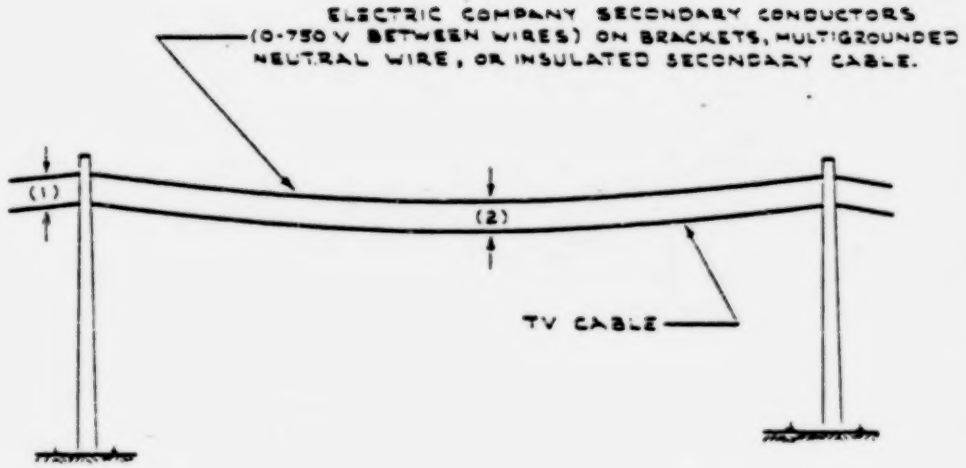



NOTES:
1. ALL TV SERVICE DROPS TO BE ATTACHED A MINIMUM OF 12 INCHES FROM POLE FACE.
2. NO CLIMBING AIDS ALLOWED ON POLES.
3. TV AMPLIFIER TO BE A MINIMUM OF 12 INCHES FROM POLE FACE. (NEVER ATTACHED TO POLE)
4. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. ( USE RUBBER GLOVES)

APPD. BY DIST. STDS. COMMITTEE ..... CHAIRMAN .....

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH TELEPHONE CROSSARM

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | J-H-1 |
|---|---|---|---|




(1) 40 INCH MINIMUM CLEARANCE AT SUPPORT

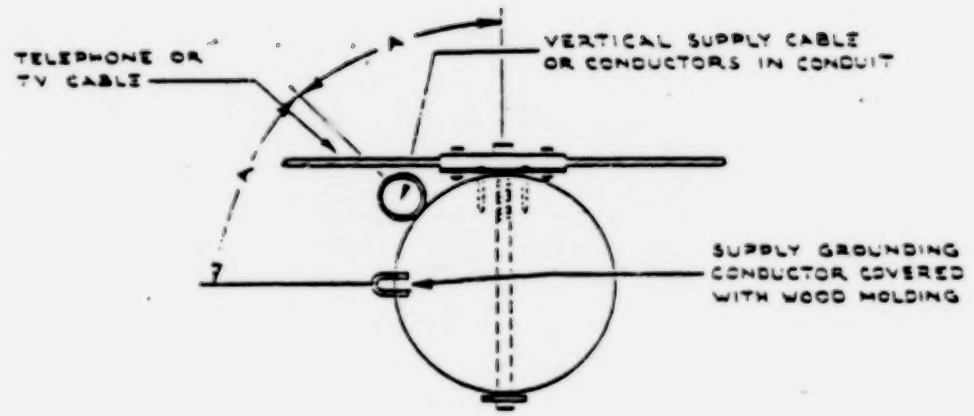
(2) 30 INCH MINIMUM MID-SPAN CLEARANCE

APPD. BY DISTR. STDS. COMMITTEE _____ CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
## CLEARANCE PARALLELING OTHER WIRES

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | 1-2 |
|---|---|---|---|



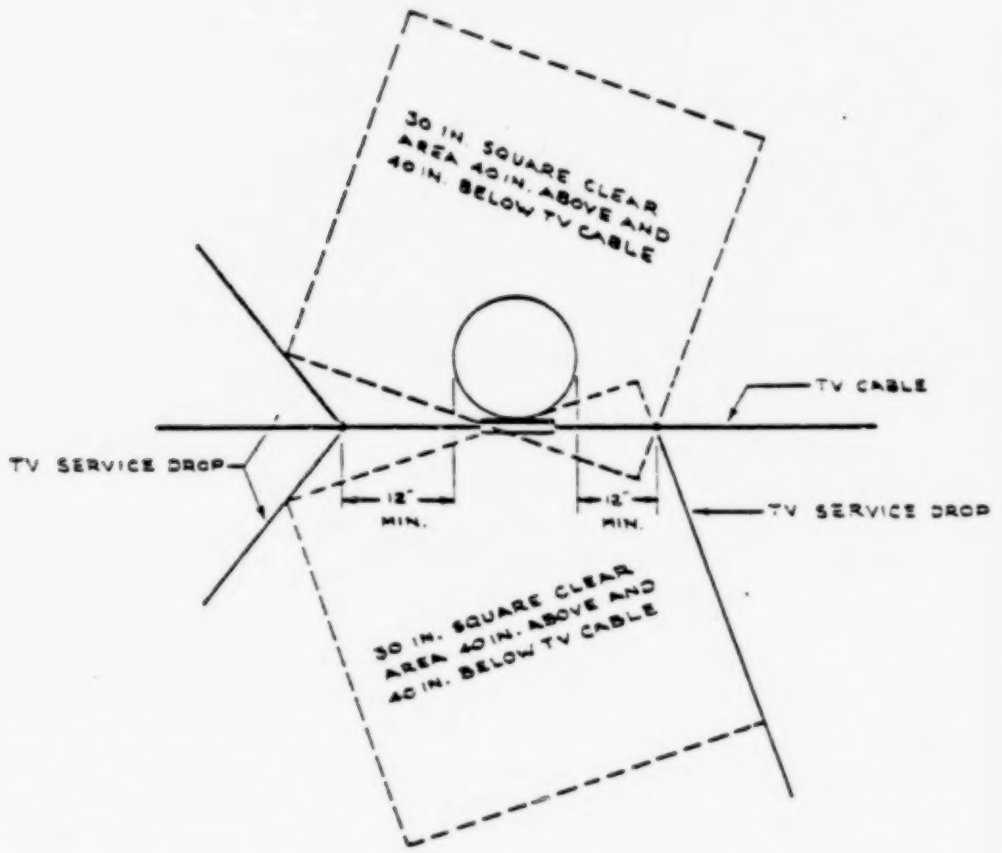



NOTE:
DIMENSION "A" TO BE 45° WHERE PRACTICABLE BUT IN NO CASE SHALL VERTICAL RUNS HAVE A CLEARANCE OF LESS THAN 2 IN. FROM THE NEAREST METAL PART OF THE EQUIPMENT OF ANOTHER USER.

APPD. BY DISTR. STDS. COMMITTEE _____ CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
## LOCATION OF VERTICAL RUNS

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | 7-2-1 |
|---|---|---|---|




ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
CLIMBING SPACE ON JOINTLY USED POLES



## ATTACHMENT AGREEMENT BETWEEN FLORIDA POWER CORPORATION AND ACTON CATV, INC. d/b/a PASCO ASSOCIATES VENTURE

*SECTION 0.1* THIS AGREEMENT, made and entered into this 16th day of June, 1980, by and between FLORIDA POWER CORPORATION, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company", and Acton CATV, Inc. d/b/a Pasco Associates Venture, organized and existing under the laws of the State of Massachusetts, herein referred to as the "Television Company".

**WITNESSETH:**

*SECTION 0.2* WHEREAS, the Television Company proposes to furnish cable television distribution service in Sections 9, 10, 14, 15, 16, 21, 23, 27, 28, 29, 31, 33, and 34, Township 25 South, Range 16 East, and Sections 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 19, 20, 28, 29, 30, 31, 32 and 33, Township 26 South, Range 16 East, Pasco County, Florida; and will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company; and

*SECTION 0.3* WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

*SECTION 0.4* NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein con-

tained, the parties hereto mutually covenant and agree as follows:

## ARTICLE I

## SCOPE OF AGREEMENT

*SECTION 1.1* This agreement shall be in effect in the portions of counties described in Section 0.2 above in which the Electric Company provides electric distribution service.

*SECTION 1.2* The Electric Company reserves the right to deny the attachment of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service, including, but not limited to, poles which in the judgment of the Electric Company (i) are required for the sole use of the Electric Company, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards, or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

*SECTION 1.3* Pursuant to the rights provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission line (lines with voltage in excess of 50 KV between conductors) and concrete poles without special written permission from the Electric Company.

## ARTICLE II

## PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

*SECTION 2.1* Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefore in the form of Exhibit A, attached hereto and made a part



hereof. Unless waived in writing by the Electric Company, the Television Company shall commence and complete all attachment work within the time limits set forth in said Exhibit A.

*SECTION 2.2* The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall forthwith, at its own expense, upon notice from the Electric Company, remove, relocate, replace or renew its facilities placed on any pole or pole line, or transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of an emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles, or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the cilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the nonbetterment expense thereby incurred. Nothing in this Section shall be construed to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

*SECTION 2.3* The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the Electric Company and of the National

Electrical Safety Code, or any amendments or revisions of said specifications or code. Drawings marked 1-G-1, 1-H, 1-H-1, 1-I, 1-I-1, 1-J, attached hereto and by this reference thereto incorporated herein, when not otherwise specified by the Electric Company, are descriptive of minimum required construction under some typical conditions, and will be amended as related Electric Company specifications are changed.

*SECTION 2.4* In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company; and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate, together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company's facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments



of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

*SECTION 2.5* The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

*SECTION 2.6* The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles, and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to any appliance or equipment of a subscriber to the Television Company's service, arising from accidental contact with the Electric

Company's energized conductors, shall be assumed by the Television Company.

## ARTICLE III

## EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

*SECTION 3.1* Notwithstanding the provisions of Section 12.1, the Television Company shall, as conditions precedent to the exercise of any rights granted by this Agreement, submit to the Electric Company: (1) certified copies of all franchises, permits, licenses or certificates of convenience and necessity granted by state and local governmental bodies authorizing the Television Company to erect and maintain its facilities within public streets, highways, and other thoroughfares located within the geographical area described in Section 0.2, and (2) a certified copy of its certificate from the Federal Communication Commission authorizing it to own and operate a cable television system in the geographical area described in Section 0.2.

## ARTICLE IV

## RIGHT-OF-WAY FOR TELEVISION COMPANY'S ATTACHMENTS

*SECTION 4.1* It shall be the sole responsibility of the Television Company to obtain for itself such rights-of-way or easements as may be appropriate for the placement and maintenance of its attachments to the Electric Company's poles located on private property. While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights-of-way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, municipalities or others for use of poles and right-of-way easement by the Television Company; and if objection



is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time, upon thirty (30) days' notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right-of-way easement at its sole expense. Should the Television Company fail to remove its attachments and appliances, as herein provided, the Electric Company may remove them without any liability for loss or damage, and the Television Company shall reimburse the Electric Company for the expense incurred.

## ARTICLE V

## INSPECTION

*SECTION 5.1* The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its lines or appliances and to make periodic inspections, semi-annually or oftener [*sic*] as plant conditions may warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement; provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

*SECTION 5.2* Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within

thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

*SECTION 5.3* The Television Company shall furnish bond issued by a corporate surety acceptable to the Electric Company to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections, or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions, as provided on the attachment Schedule of Required Bond Coverage. The Schedule of Required Bond coverage may be subject to revision by the Electric Company from time to time to be consistent with any increases in construction costs or rental attachment rates. The Electric Company will give the Television Company ninety (90) days notification prior to the effective date of any such Schedule revision.

## ARTICLE VI

## ABANDONMENT AND REMOVAL OF ATTACHMENTS

*SECTION 6.1* The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, attached hereto and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

*SECTION 6.2* Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by governmental authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.



## ARTICLE VII

## RENTAL AND PROCEDURE FOR PAYMENTS

*SECTION 7.1* Television Company shall pay to the Electric Company, for attachments made to poles under this agreement, a rental at the rate of ($7.15) Seven Dollars and 15/100 per pole per year. Said rental shall be payable semi-annually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semi-annual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December immediately preceding the respective due dates for semi-annual payments. The first payment of rental hereunder shall include such prorated amount as may be due for use of poles for the period of time from the effective date hereof until the end of the calendar year in which the agreement becomes effective.

*SECTION 7.2* If the Electric Company decides to make a field inspection of the entire plant of the Television Company in accordance with Section 5.1 of this Agreement and, further, if the Electric Company finds that the attachment inventory records are in error, then upon completion of such inventory, the office records will be adjusted accordingly and subsequent billing will be based on the adjusted number of attachments. The corrections to the estimations made over the years elapsed since the preceding inventory shall be prorated equally (i.e., if the latest joint field check shows 100 more CATV attachments than office records indicate and if the interval since the last joint field check is 5 years, then each of the intervening annual pole inventory amounts would be adjusted upward by 20 poles). In calculating retroactive billing for the years elapsed since a preceding inventory, full consideration will be given for the cost of money, as experienced by the Electric Company, over that period of time. The prime annual interest rate used in calculating the annual cost of

money will be determined by using average annual interest rate, + 2%, for the 7 Southeast centers, Bank rates on short-term business loans, money and interest rates, *Survey of Current Business*, as published by the United States Department of Commerce/Social and Economic Statistics Administration/Bureau of Economic Analysis.

*SECTION 7.3* If for any reason the Television Company is delinquent in the payment of any bills as herein provided by this contract and upon 30 days after receipt of an invoice from the Electric Company, the Electric Company can, at its option, charge the Television Company prime annual interest as defined in the aforementioned Section 7.2.

## ARTICLE VIII

## PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

*SECTION 8.1* The attachment rate set forth in Section 7.1 shall be subject to annual revision at the request of either party made in writing to the other not later than sixty (60) days before the anniversary date of this agreement. If the parties hereto fail to agree upon a revision of such rate prior to said anniversary date, the then attachment rate for each subsequent annual period until further revised, shall be an amount equal to one-half of the current annual cost of installing and maintaining an average attachment pole.

*SECTION 8.2* Current annual cost as referred to in Section 8.1 refers to the current carrying charges which would be experienced by the Electric Company by owning, installing and maintaining an average attachment pole and is arrived at by using current costs to install an average attachment pole and then applying a percentage (a fixed charge rate which includes all related costs associated with ownership thereto covering current fixed charges).



*SECTION 8.3* An average attachment pole, as referred to in Sections 8.1 and 8.2, is defined to mean the average of a 35-foot and 40-foot pole.

## ARTICLE IX

## DEFAULTS

*SECTION 9.1* If the Television Company shall fail to comply with the provisions of this agreement, including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and such default or non-compliance shall continue for thirty (30) days after notice thereof in writing from the Electric Company to correct such default or non-compliance, all rights of the Television Company hereunder shall be suspended, including its right to occupy the Electric Company's poles and, if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles to which such default or non-compliance shall have occurred. In case of such termination, no refund or prepaid rentals shall be made.

## ARTICLE X

## LIABILITY AND INSURANCE

*SECTION 10.1* The Television Company shall assume full responsibility for the attachment of its facilities pursuant to this agreement and will defend and hold the Electric Company harmless against and indemnify it for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement, irrespective of negligence actual or claimed on the part of the Electric Company. If any member of the public, or any employee or agent of the Television Company, or any employee or agent of a contractor is injured

or killed, or if any property including the Electric Company's or the public's is damaged in the course of work being performed under the provisions of this agreement, the Television Company will notify the Electric Company personnel who is inspecting the work, or in his absence, the Electric Company's supervisor who originated the contract with the Television Company. Such notification will be made immediately in person and or by telephone and promptly confirmed in writing, and will include all pertinent data such as name of injured party, location of accident, description of accident, nature of injuries, names of witnesses, disposition of injured or deceased person.

*SECTION 10.2* As a safeguard in respect to Section 10.1 above, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (a) General Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence and $200,000 aggregate, and (b) Automobile Liability with Bodily Injury limits not less than $500,000 each person and $1,000,000 each occurrence and with Property Damage limits not less than $100,000 each occurrence. The Television Company will have the insurance policies mentioned in (a) and (b) above, respectively, endorsed by its insurance carrier to provide blanket contractual coverage, expressly with respect to Section 10.1 above, to the full limits of and for the liabilities insured under said policies; and prior to the commencement of any work hereunder, the Television Company will furnish the Electric Company with a certificate, in duplicate, on the Electric Company's Form 908-404(S) completed by the Television Company's insurance carrier showing it carries the requisite insurance and that the specified policies insure the liability assumed by the Television Company under Section 10.1 above.



*SECTION 10.3* The Television Company is hereby advised that the generation, transmission and/or distribution of electrical energy involves the handling of a natural force which, when uncontrolled, is inherently hazardous to life and property. The Television Company is further hereby advised that, due to the nature of the work to be performed hereunder, other hazardous or dangerous conditions (not necessarily related to the inherent danger of electricity) may also be involved in the work. Accordingly, prior to the commencement of the attachment of any cable television facilities to the poles of the Electric Company, the Television Company shall inspect the job site specifically to ascertain the actual and potential existence and extent of any hazardous or dangerous conditions, and instruct its employees with respect to said conditions and the safety measures to be taken in connection therewith; and during the course of the work, the Television Company shall take all such measures as may be deemed necessary or advisable to protect and safeguard the person and property of its employees and of the general public against all hazardous or dangerous conditions as the same arise.

*SECTION 10.4* The Television Company and its duly authorized agents and employees shall, before climbing poles or structures, make certain that they are strong enough to safely sustain workmen's weight in the performance of the required work on the poles or structures. All work designated in any Application and Permit under this agreement to be performed near energized electrical conductors shall be performed under the conditions and at the place as stated, but only with the specific understanding that if the Television Company in its sole discretion regards the place where such work is to be performed, or where such work is being performed, as an unsafe place to work, either because the said conductors or other equipment are so energized, or because it is deemed unsafe for any other reason or condition or conditions then and there existing, it shall request the Electric Company for a clearance to

de-energize the said conductors or other equipment, or to make such other change or changes as may be necessary or desirable in the Television Company's sole discretion, to render the place of performance at the job site a safe place to work for the Television Company's employees. In the absence of any request by the Television Company to the Electric Company it shall be conclusively presumed that the place where the work is to be performed is a safe place to work without the de-enerization [*sic*] of such conductors or other equipment, and without making any changes whatsoever at the job site.

## ARTICLE XI

## EXISTING RIGHTS OF OTHER PARTIES

*SECTION 11.1* Nothing herein contained shall be construed to confer on the Television Company an exclusive right to make attachments to the Electric Company's poles in the area covered by this agreement and any supplement thereto, and it is expressly understood that the Electric Company has the unconditional right to permit any other person, firm or corporation to make attachments to the same poles in that area covered in this agreement and supplements thereto. However, under no circumstances will the Electric Company grant permits permitting more than one attachment for cable television distribution service to any pole or pole line.

## ARTICLE XII

## TERM OF AGREEMENT

*SECTION 12.1* This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 9.1 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time



thereafter by giving the other party at least a six (6) months' written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and appliances from all poles of the Electric Company. If not so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefor. The Electric Company shall deliver to the Television Company, or the bonding company, any equipment so removed upon termination of this agreement, upon payment of the cost of removal, cost of storage and delivery, and all other amounts then due the Electric Company.

## ARTICLE XIII

## ASSIGNMENT OF RIGHTS

*SECTION 13.1* The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

*SECTION 13.2* No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere revocable license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny licensing of any poles to the Television Company for any reason whatsoever (within the sole discretion of the Electric Company).

## ARTICLE XIV

## WAIVER OF TERMS OR CONDITIONS

*SECTION 14.1* Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall

not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

## ARTICLE XV

## BONDING TO ELECTRIC COMPANY GROUND

*SECTION 15.1* For the purpose of this article, the following terms when used herein shall have the following meaning, to wit:

*15.1.1* "Vertical ground wire" shall mean a wire conductor of the Electric Company attached vertically to the pole and extended from the Electric Company's multi-grounded neutral (defined below) through the Television Company's space to the base of the pole where it may be either butt wrapped on the pole or attached to a grounded electrode.

*15.1.2* "Multi-grounded neutral" shall mean an Electric Company conductor located in the Electric Company's space which is bonded to all Electric Company vertical ground wires.

*15.1.3* "Bonding Wire" shall mean a number 6 AWG copper wire conductor connecting equipment of the Television Company and the Electric Company to the vertical ground wire.

*SECTION 15.2* At the time the Television Company cable is installed, the Television Company shall install a "bonding wire" on every pole where a "vertical ground wire" exists. Any piece of television equipment attached to an Electric Company pole which does not have a "vertical ground wire" shall be bonded to the television cable messenger.



*SECTION 15.3* Under no condition will the Electric Company's vertical ground wire be broken, cut, severed, or otherwise damaged by the Television Company.

*SECTION 15.4* The Electric Company reserves the right to install a "bonding wire" to any piece of television equipment where, in the opinion of the Electric Company, a safety hazard exists or may exist in the future.

*SECTION 15.5* It shall be the responsibility of the Television Company to instruct its personnel working on the Electric Company's poles of the dangers involved in bonding its wires to the Electric Company's "vertical ground wire" and associated dangers thereof, and to furnish adequate protective equipment so as to save its personnel from bodily harm. As stated in Article X above, the Electric Company assumes no responsibility either for instructing, for furnishing equipment to, or for the liability involved in the Television Company's personnel working on the Electric Company's poles.

## ARTICLE XVI

## AUTOMATIC TERMINATION

*SECTION 16.1* Notwithstanding the provisions of Section 12.1 of this agreement, it shall be automatically terminated on x x x x x x x x, 19xx, in the event that the Television Company shall fail to commence making cable attachments on or before that date; it shall be automatically terminated on x x x x x x x x, 19xx, in the event that the Television Company shall fail to provide television distribution service throughout the area described in Section 0.2 of this agreement on or before that date; it shall be automatically terminated upon expiration, suspension, cancellation or termination of any franchise, license, permit or certificate of convenience and necessity that the Television Company is required by law to obtain and maintain in full force and effect.

Subject to the provisions of Section 13.1 hereof, this agreement shall extend to and bind the successors and assigns of the parties hereto.

## ARTICLE XVII
## MISCELLANEOUS PROVISIONS

*SECTION 17.1* Attorney's Fees. In the event of any litigation between the parties hereto brought to enforce rights granted by this agreement, the prevailing party therein shall be allowed all reasonable attorney's fees expended or incurred in such litigation, in trial and appellate courts, to be recovered as a part of the costs therein.

*SECTION 17.2* Venue of Actions. Any and all litigation between the parties hereto arising out of this agreement shall be instituted and maintained in the Circuit Courts for Pinellas County, Florida, with the exception of any cause of action arising by virtue of the laws of the United States, which litigation shall be instituted in the United States District Court, Middle District, Tampa Division.

*SECTION 17.3* Controlling Law. This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

## ARTICLE XVIII
## EXISTING CONTRACTS

*SECTION 18.1* This agreement supersedes the existing agreement entered into between the two parties on the x x x x day of x x x x x x x, 19xx.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day, month and year first above written.



Attest:

/s/ BETTY M. CLAYTON
Asst. Secretary

FLORIDA POWER CORPORATION

By /s/ NED B. SPARKE
Vice President

ACTON CATV, INC. d/b/a BROOKSVILLE PROPERTIES VENTURE

Attest:

/s/ Illegible
Asst. Secretary

By /s/ Illegible
Vice President

## SCHEDULE OF REQUIRED BOND COVERAGE

| NUMBER OF ATTACHMENTS | AMOUNT OF COVERAGE |
|---|---|
| 0 - 500 | $ 5,000 |
| 501 - 1,000 | 10,000 |
| 1,001 - 2,000 | 20,000 |
| 2,001 - 3,000 | 30,000 |
| 3,001 - 4,000 | 40,000 |
| 4,001 - 5,000 | 50,000 |
| 5,001 - 6,000 | 60,000 |
| 6,001 - 7,000 | 70,000 |
| 7,001 - 8,000 | 80,000 |
| 8,001 - 9,000 | 90,000 |
| Over 9,000 | 100,000 |



## EXHIBIT A

## ATTACHMENT RENTAL CONTRACT

## AND
## FLORIDA POWER CORPORATION
**Application and Permit**

_____, 19____

_____

In accordance with the terms of agreement dated ____, 19____, application is hereby made for permit to make attachments to Florida Power Corporation poles for installation of cable television facilities as indicated on the attached construction detail drawing/s number/s _____ .

Certified copies of approved construction permits, as may be required by local governmental authority for the facilities indicated on the drawing/s, are attached also. Construction work, as provided for under this "Application and Permit," shall commence within thirty (30) days and be completed within one hundred twenty (120) days of the approval date of this application and permit as set forth below, otherwise this application and permit shall become null and void.

By _____

Title _____

Permit will be granted, subject to your approval of the following changes and rearrangements at an estimated cost to you of $_____, payable in advance.

Permit denied under Section 13.2, _____, 19____.

The above changes and rearrangements approved ____, 19____, and advance payment therefor enclosed.

By _____

Title _____

Permit Approved _____, 19____

By _____

Permit No. _____

Total Previous Attachments

Attachments This Permit ___

New Total _____

Title _____



**EXHIBIT B**

**ATTACHMENT RENTAL CONTRACT**

**AND**

**FLORIDA POWER CORPORATION**

**Notification of Removal by Television Company**

_____, 19____.

_____

In accordance with the terms of the agreement dated ____, 19____, kindly cancel from your records the following poles covered by Permit No. _____, from which attachments were removed on _____, 19____.

Location: City _____ County _____, Florida.

| Pole Number | Permit No. | Pole Location |
|---|---|---|

By _____

Title _____

Notice Acknowledged _____, 19____

By _____

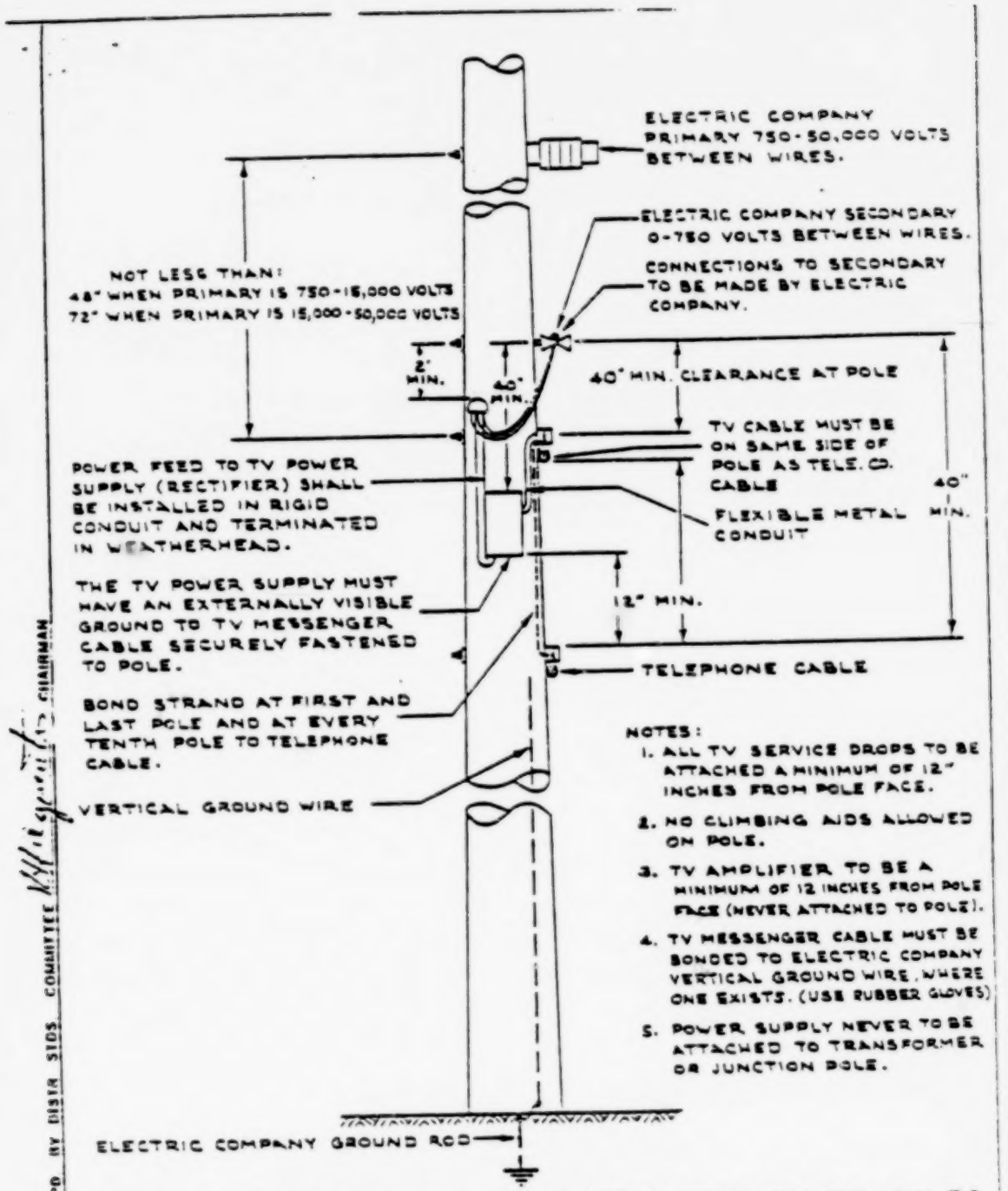
Title _____

Notice No. _____

Total Poles Discontinued This Notice _____

Pole Previously Vacated _____

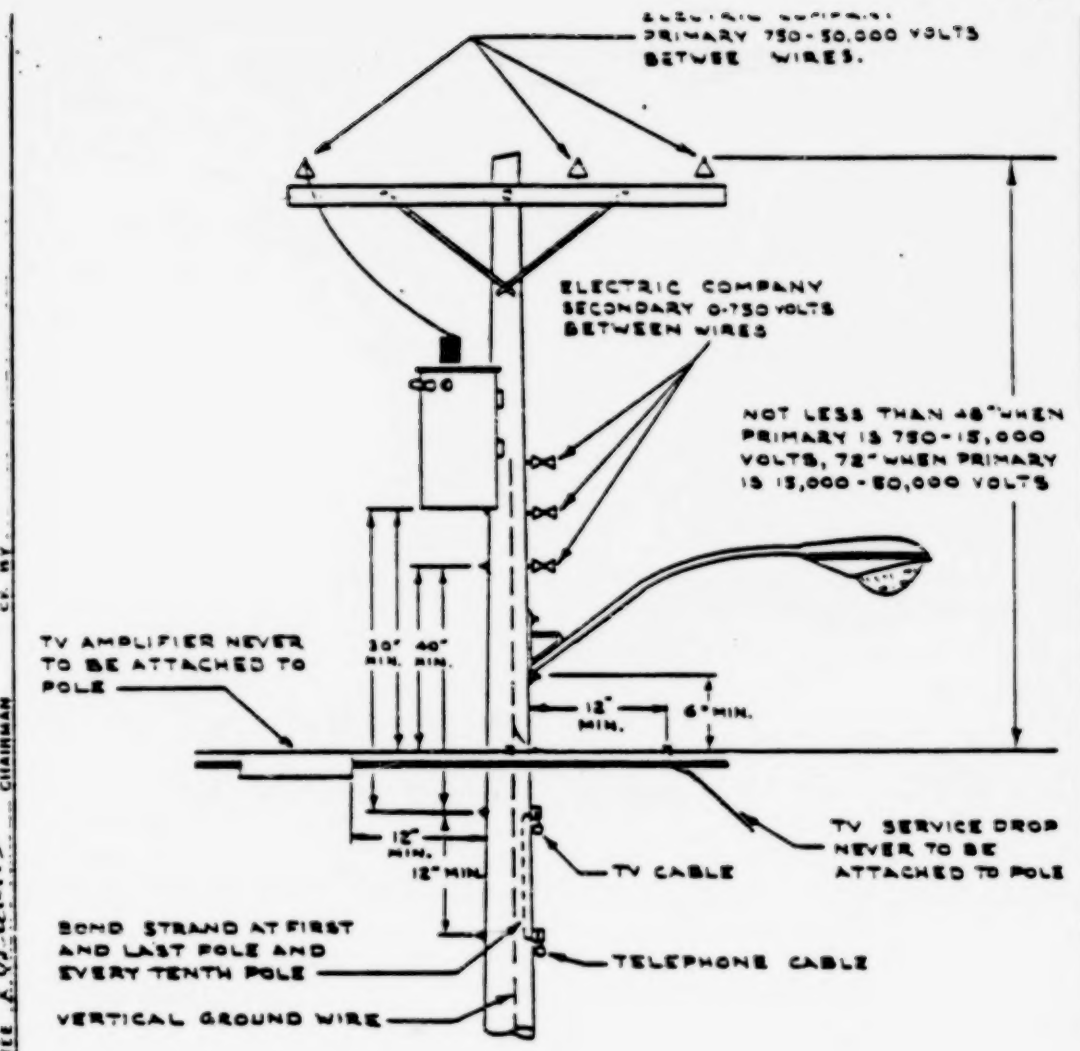
Total Poles Vacated To Date _____




## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH INSULATED SECONDARY CABLE

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | 1-G-1. |
|---|---|---|---|

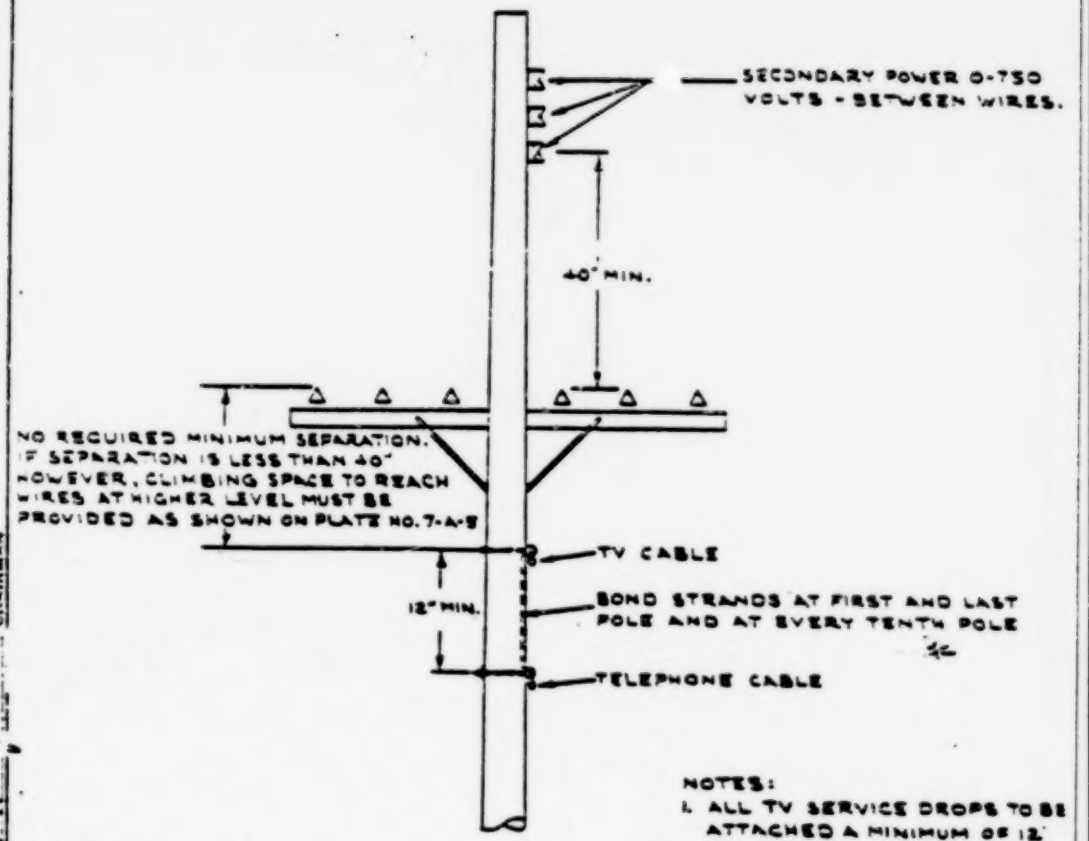





1. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES), ( DO NOT CUT WOOD MOLDING)
2. NO CLIMBING AIDS ALLOWED ON POLE.
3. POWER SUPPLY NEVER TO BE ATTACHED TO TRANSFORMER OR JUNCTION POLE.

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES WITH BARE SECONDARY CONDUCTORS

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 5-9-72 | 1-H |
|---|---|---|---|




NOTES:

1. ALL TV SERVICE DROPS TO BE ATTACHED A MINIMUM OF 12" INCHES FROM POLE FACE.
2. NO CLIMBING AIDS ALLOWED ON POLES.
3. TV AMPLIFIER TO BE A MINIMUM OF 12 INCHES FROM POLE FACE. (NEVER ATTACHED TO POLE)
4. TV MESSENGER CABLE MUST BE BONDED TO ELECTRIC COMPANY VERTICAL GROUND WIRE, WHERE ONE EXISTS. (USE RUBBER GLOVES)

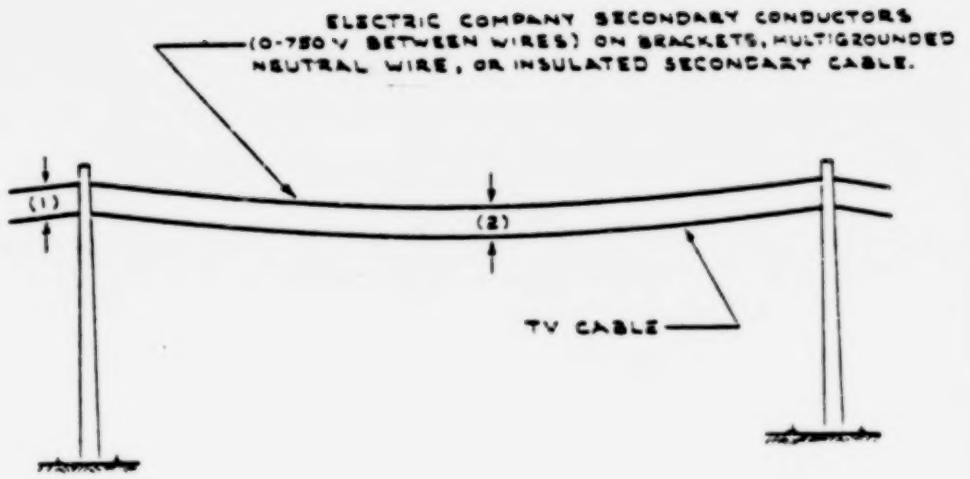
APPD. BY DIST. STDS. COMMITTEE R.W. Wagstaff CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

## WITH TELEPHONE CROSSARM

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | J-M-1 |
|---|---|---|---|






(1) 40 INCH MINIMUM CLEARANCE AT SUPPORT

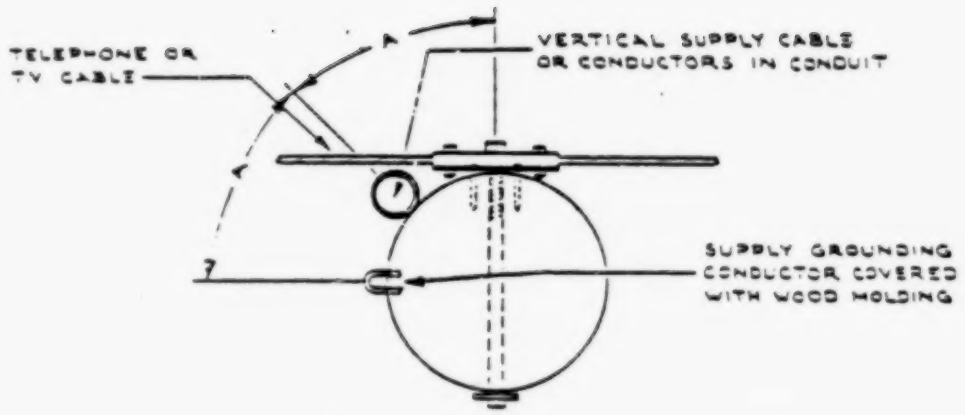
(2) 30 INCH MINIMUM MID-SPAN CLEARANCE

APPD. BY DIST. STDS. COMMITTEE R.W. Wagstaff CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES

## CLEARANCE PARALLELING OTHER WIRES

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | J-I |
|---|---|---|---|



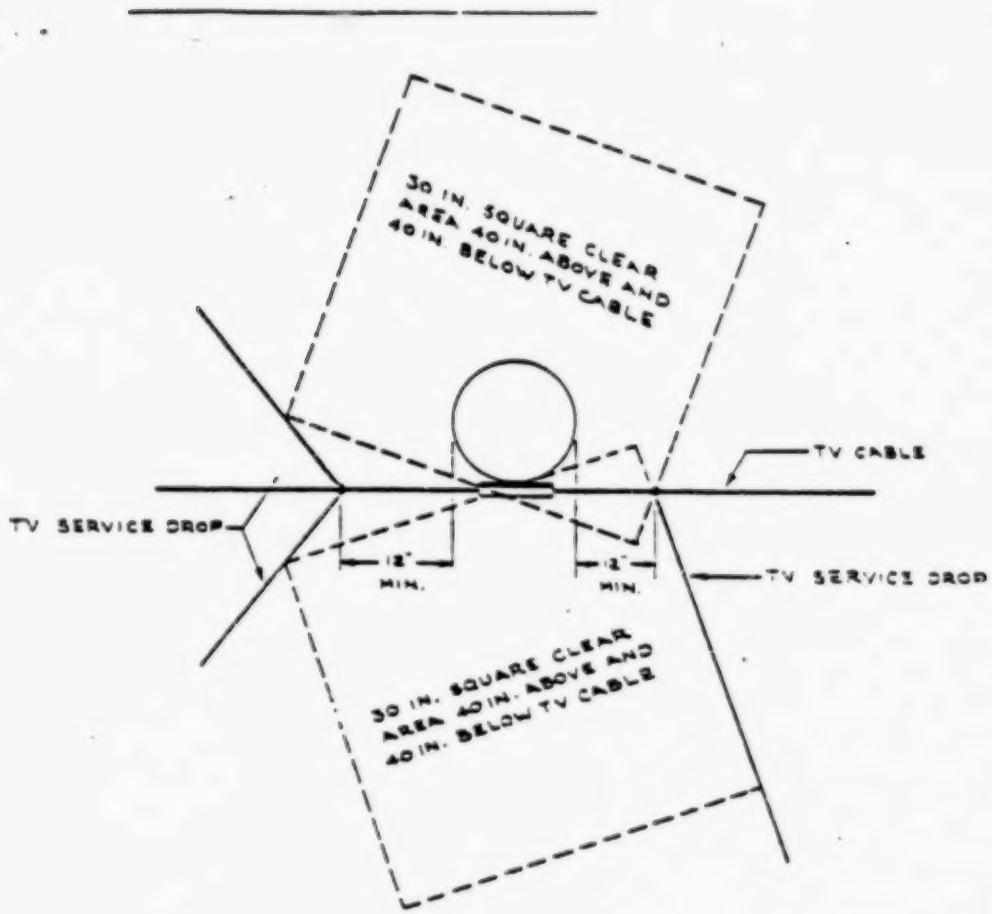

NOTE:
DIMENSION "A" TO BE 45° WHERE PRACTICABLE BUT IN NO CASE SHALL VERTICAL RUN, HAVE A CLEARANCE OF LESS THAN 2 IN. FROM THE NEAREST METAL PART OF THE EQUIPMENT OF ANOTHER USER.

APPD BY DISTR STDS. COMMITTEE [illegible] CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
## LOCATION OF VERTICAL RUNS

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | 7-I-1 |
|---|---|---|---|






APPD BY DISTR STDS. COMMITTEE [illegible] CHAIRMAN

## ATTACHMENTS OF CATV TO DISTRIBUTION POWER POLES
## CLIMBING SPACE ON JOINTLY USED POLES

| FLORIDA POWER CORPORATION | DISTRIBUTION CONSTRUCTION STANDARDS | 6-7-67 | 7-J |
|---|---|---|---|

[FIRST PAGE OF EXHIBIT C DELETED -- FIRST PAGE OF RESPONSE OF FLORIDA POWER CORPORATION (JAN. 27, 1981) FILED IN TELEPROMPTER CORP., ET AL. V. FLORIDA POWER CORP., PA-81-0008 (COMMON CARRIER BUREAU JULY 16, 1981)]



STATE OF FLORIDA )
COUNTY OF PINELLAS )

**FILE NO. PA-81-0008**

**AFFIDAVIT OF GARY E. CLAYTON**

BEFORE ME, the undersigned authority, on this day personally appeared GARY E. CLAYTON, who, after being sworn, deposes and says:

1. My name is Gary E. Clayton. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Electrical Engineering from the Georgia Institute of Technology, Atlanta, Georgia. I have been employed by Florida Power for the past ten years. My experience in that time has included two years in the area of distribution engineering, five years in the area of transmission engineering, and three years in my present position in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and b) the Complaint filed by Teleprompter Corporation and Teleprompter Southeast, Inc. ("Teleprompter") against Florida Power, File No. PA-80-_____. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.42. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $9.63. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. A [*sic*] of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 524,044 poles as of November 30, 1980. Its tabulation of poles as of December 31, 1980 has not yet been concluded. Net investment per pole, expressed as the quotient of net investment divided by the number of poles owned by the Florida Power Corporation, was $96,75.



$$\frac{\text{Net Pole Investment}}{\text{Number of Poles}} = \$96.75 = \text{Net Investment per pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by the Florida Public Service Commission method. The figure includes a debt component (long term debt & customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

| Return (Cost of Capital) | % of Capital | | Cost of Capital |
|---|---|---|---|
| Long-term Debt | .4567 | at | 8.81% |
| Preferred Stock | .1086 | at | 8.30% |
| Common Stock | .2929 | at | 14.6% |
| Cost Free Deferred Tax Credits | .1280 | at | 0 % |
| Customer Deposits—Active | .0136 | at | 8 % |
| Customer Deposits—Inactive | .0002 | at | 0 |
| Composite Cost of Capital | | | 9.31% |

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross

investment in the FERC 364 & 365 accounts and multiplied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364 \& 365 accounts}} = \frac{\$10,581,432}{\$166,512,836} = 6.35\% = \text{Maintenance expense rate for gross investment}$$

6.35% x 1.4917 = 9.48% = Maintenance expense rate for net investment

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29,943,156}{\$2,078,396,138} = 1.44\% = \text{Administrative expense rate for gross investment}$$

1.44% x 1.4917 = 2.15% = Administrative expense rate for net investment

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment



4.55% x 1.4917 = 6.79%

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the return. The required return on capital has been reduced by including the interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method, and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio = .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = Capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \frac{(.487)}{(1-.487)}\left(1 - \frac{(.4703)(8.79))}{(\quad 9.31 \quad)}\right)((\text{A/P}, 9.31\%\ 22\text{years}) - .0455)$$

Income Tax = 3.32%

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which will be reported on account 408.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

Other taxes (except for franchise fees) / Gross Plant Investment = $36,940,257 / $2,078,396,138 = 1.78% = Other tax rate for gross investment

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 33.70% equal the sum of the individual components derived above in paragraphs 10-15:

| | % of Net Pole Cost |
|---|---|
| Return (Cost of Capital) | 9.31 |
| Maintenance Expenses | 9.48 |
| Administrative Expenses | 2.15 |
| Depreciation | 6.79 |
| Federal & State Income Taxes | 3.32 |
| Other Taxes | 2.65 |
| Total | 33.70 |

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$96.75 x 33.7% = $32.60 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.42.

19. The present pole attachment rate of $6.51 is fair and just. It is much lower than the annual pole cost Teleprompter would incur if it owned its own pole system.

20. It is reasonable to assume that a Teleprompter-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. Exhibit C, paragraph 2 of the Complaint shows a General Telephone Company of Florida net investment per pole of $57.18. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for a Teleprompter-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for a Teleprompter owned system of $19.27.



$57.18 x 33.7% = $19.27

21. If Teleprompter were to share equally the costs of its pole system with another user, the annual cost for each party would be $9.63, still well above the rate Teleprompter pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Teleprompter less than half of the rate Teleprompter would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Teleprompter's anchor attachments are not attachments to poles, ducts, conduits or rights-of-way owned or controlled by Florida Power.

24. For safety reasons, Florida Power does not encourage the use of its anchors by CATV companies. After discovering more than 1000 unauthorized Teleprompter anchor attachments, Florida Power reached a contractual agreement for anchor rentals as a alternative to forcibly removing the attachments.

25. Florida Power requires bonding payments from all cable companies renting pole attachments. Past experience with such companies proves the necessity for the protection bonding payments provide.

Signed this 16th day of January, 1981.

/s/ GARY E. CLAYTON
GARY E. CLAYTON

Sworn to and subscribed before me this 16th day of January, 1981.

/s/ JUDITH A. JENGLING
JUDITH A. JENGLING
Notary Public



## EXHIBIT D

### Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreciation reserve, minus 15% of the investment to reflect that part of the gross plant attributable to crossarms and other items not usable for CATV attachments.

85% (Gross Pole Investment - Pole Depreciation Reserve)

= Net Investment in Bare Poles

85% ($88,975,480 - $29,327,582) = $50,700,713.30

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare pole divided by the number of poles from which net investment is calculated.

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$50,700,713.3}{524,044} = \$96.75$$

3. *Carrying Charge.* The carrying charge consists of maintenance expense, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole and conductor maintenance expenses (account 593) by the net investment in poles (account 364) and in overhead conductors (account 365), from which account 593 is derived. Net pole investment consists of gross pole investment less depreciation reserve. Net conductor investment is calculated on the assumption that

conductor depreciation reserve bears the same ratio to plant depreciation reserve as gross conductor investment bares to gross plant investment.

Plant Depreciation Reserve x $\frac{\text{Gross Conductor Investment}}{\text{Gross Plant Investment}}$ = Conductor Depreciation Reserve

$414,191,834 x $\frac{\$77,537,356}{\$2,078,396,138}$ = $15,451,982

$$\frac{\text{Pole \& Conductor Maintenance Expenses}}{(\text{Gross Pole Investment} - \text{Depreciation Reserve}) + (\text{Gross Conductor Investment} - \text{Depreciation Reserve})}$$

= Maintenance Expense (expressed as a percentage of net pole investment)

$$\frac{\$10,581,432}{(\$88,975,480 - \$29,327,582) + (\$77,537,356 - \$15,451,982)} = 8.69\%$$

b. *Depreciation.* The depreciation rate may be calculated for straight-line depreciation as the quotient of 1 minus salvage value (as approportion of cost) divided by the useful life of a utility pole.

$\frac{(1\text{-salvage value})}{22}$ = Depreciation Rate for Gross Pole Investment

$\frac{1 - 0}{22} = 4.55\%$

Depreciation Rate for Gross Pole Investment x $\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}}$ = Depreciation (expressed as a percentage of net pole investment)

$$4.55\% \times \frac{\$88,975,480}{(\$88,975,480 - \$29,327,582)} = 6.79\%$$

c. *Administrative Expense.* FERC Form 1 does not provide figures for administrative expense associated with only poles. We have assumed, for purposes of developing a complete carrying charge, that net pole investment carries the same proportion of such expense as net plant investment. The administrative expense may be expressed as a percentage of net plant investment by dividing the administrative expense by the difference between the gross plant investment and plant depreciation reserve.



$$\frac{\text{Administrative Expenses}}{(\text{Gross Plant Investment} - \text{Plant Depreciation Reserve})}$$ = Administrative Expense (expressed as a percentage of net plant investment)

$$\frac{\$29,943,156}{(\$2,078,396,138 - \$414,191,834)} = 1.80\%$$

d. *Taxes.* FERC Form 1 does not provide figures for tax expense attributable to pole lines only. It is therefore assumed that net pole investment bears the same proportion of taxes as net plant investment. Tax expense may be expressed as a percentage of net plant by dividing taxes paid by the differences between the gross plant investment and plant depreciation reserve.

$$\frac{\text{Taxes Paid}}{(\text{Gross Plant Investment} - \text{Plant Depreciation Reserve})}$$ = Taxes (expressed as percentage of net plant investment)

$$\frac{\$74,930,556}{(\$2,078,396,138 - \$414,191,834)} = 4.51\%$$

e. *Cost of Capital* FERC Form 1 does not include a cost of capital figure (return on equity and interest on debt). Therefore, Complainant relies on Respondent's figures set forth in Exhibit C.

9.31%

f. *Total Carrying Charge.* Adding the various percentage components yields a carrying charge of 31.10%.

| | |
|---|---|
| Maintenance Expense | 8.69% |
| Depreciation | 6.79% |
| Administrative Expense | 1.8 % |
| Taxes | 4.51% |
| Cost of Capital | 9.31% |
| TOTAL CARRYING CHARGE | 31.10% |

4. *Use Ratio.* The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) and the total useable space. Since Respondent has not provided any data to calculate useable space, it may be presumed that a reasonable estimate of 13.5 feet may be used. 47

C.F.R. § 1.1409(a); *Memorandum Opinion and Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59, 68-69 (1979); *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, 79 F.C.C.2d 232 (1980).

$$\frac{\text{Space used by CATV}}{\text{Total Useable Space}} = \text{Use Ratio}$$

$$\frac{1 \text{ Foot}}{13.5 \text{ Feet}} = 7.41\%$$

5. *Maximum Rate.* The maximum rate is the product of net investment per bare pole times carrying charge times use ratio.

Net Investment Per Bare Pole
x Carrying Charge
x Use Ratio
= Maximum Rate

$96.75
x 31.10
x 1/13.5
= $2.23



6. *Sources of Data.* The following table indicates the sources of the various figures used in the calculations.

| | Table of Location | |
|---|---|---|
| Item | Document and Page | Location |
| Gross Plant Investment | Exhibit C, p.4 | ¶ 12 |
| Plant Depreciation Reserve | FERC Form 1, p.113 | Schedule B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization and Depletion, Line No. 13, Column (b) |
| Pole and Conductor Maintenance Expense | Exhibit C, p.4 | ¶ 11 |
| Gross Pole Investment | Exhibit C, p.2 | ¶ 7 |
| Gross Conductor Investment | Exhibit C, pp.2,4 | ¶¶ 7, 11 |
| Pole Depreciation Reserve | Exhibit C, p.2 | ¶ 7 |
| Administrative Expense | Exhibit C, p.4 | ¶ 12 |
| Taxes Paid | FERC Form 1, p.114 | Statement of Income for the Year, Lines 11-13, Taxes, Column (c) |
| Number of Poles Owned | Exhibit C, p.2 | ¶ 8 |
| Cost of Capital | Exhibit C, p.3 | ¶ 10 |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Complaint have been mailed, postage prepaid, this *20th* day of *February*, 1981, to the following:

ALLAN J. TOPOL
COVINGTON & BURLING
888 Sixteenth St., N.W.
Washington, D.C. 20006

Counsel for Florida Power Corporation

HARRY A. EVERTY, III
Senior Counsel
Florida Power Corporation
P. O. Box 14042
St. Petersburg, Florida 33733

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ SUSAN DIANE MASSIE
SUSAN DIANE MASSIE



## BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C.

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**File No. PA-81-0023**

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In the Matter of

ACTON CATV, INC. d/b/a
BROOKSVILLE PROPERTIES VENTURE
and PASCO ASSOCIATES VENTURE
*Complainant,*

v.

FLORIDA POWER CORPORATION
*Respondent.*

TO: The Common Carrier Bureau

## RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the Complaint of Acton CATV, Inc. d/b/a/ Brooksville Properties Venture and Pasco Associates Venture ("Complainant") filed by Complainant on February 20, 1981.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises constitutional objections to the Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes a number of procedural

requests designed to conserve Commission resources and illuminate particular aspects of this controversy and possible remedies.

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainant and Respondent for the rental of pole space for cable television attachments. The rates established in that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainant, and Respondent. The agreement benefits Complainant greatly, for the rate now in effect is much lower than the annual costs Complainant would incur if it owned its own pole system. Yet Complainant now asks the Commission to abrogate the contract and impose a rental rate far lower than the negotiated rate. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

**I. Answers to Allegations in Complaint**

1. Respondent is without knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint, except for the allegation that Respondent's general office address is P.0. Box 33101. The correct address is P.O. Box 14042.

3. Respondent denies the allegations of paragraph 3 of the complaint.



4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of Respondent's poles are used for wire communications, but many are not.

5. Respondent is without knowledge or information sufficient to form a belief as to the allegations of paragraph 5 of the complaint.

6. Respondent admits the allegations of paragraph 6 of the complaint.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent denies the allegations of paragraph 8 of the complaint. Rather than "attempting to charge" Complainant an annual rental of $7.15 per pole, Respondent charges that rate pursuant to contractual agreement with Complainant.

9. Respondent admits the allegations of paragraph 9 of the complaint, except for the allegation that Complainant sought to determine the "lawfulness" of Respondent's rate, which is denied, and the allegation that the Response of Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc.* v. *Florida Power Corporation*, File No. PA-81-0008, is attached to the Complaint, which is denied because only the first page of that Response and the affidavit appended thereto are attached to the Complaint.

10. Respondent denies the allegations of paragraph 10 of the complaint.

11. Respondent denies the allegations of paragraph 11 of the complaint.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint, except for the allegations that the average useful life of a utility pole is 22 years and the depreciation rate for net investment is 6.79%, which are admitted.

16. Respondent denies the allegations of paragraph 16 of the complaint, except for the allegation that the composite cost of capital is 9.31%, which is admitted.

17. Respondent denies the allegations of paragraph 17 of the complaint.

18. Respondent denies the allegations of paragraph 18 of the complaint.

19. Respondent admits the allegation in paragraph 19 of the Complaint that Respondent presently charges a rate of $7.15. Respondent denies the remainder of paragraph 19.

20. Respondent admits the allegation in paragraph 20 of the complaint that the pole attachment agreement for a bonding payment. Respondent denies the remainder of paragraph 20.

21. Respondent denies the allegations of paragraph 21 of the complaint.

**II. Affirmative Defenses**

22. The Commission should not grant the relief requested because:

A. The relief requested would constitute a taking of private property without just compensation prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private property for a distinct and heretofore unregulated business purpose.



B. The relief requested would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

The legal memorandum attached hereto as Exhibit A further discusses the above defenses.

**III. Calculation of Pole Attachment Rates and Conditions**

23. Notwithstanding Respondent's overriding objections to Complainant's request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with Commision guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

24. Attached hereto as Exhibit B is the affidavit of Matthew R. Noble, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The data provided therein are identical to those in the affidavit of Gary E. Clayton ("Clayton affidavit") filed by the Florida Power Corporation in the case of *Teleprompter Corporation and Teleprompter Southeast, Inc.* v. *Florida Power Corporation*, File No. PA-81-0008, and appended to the Complaint in the instant proceeding as Exhibit C, with the following exceptions:

a) The income tax rate is expressed as a function of net investment. In the Clayton affidavit, the income tax rate inadvertently was expressed as a function of gross investment. *See* Affidavit paragraph 14.

(b) The number of poles is provided as of December 31, 1980. In the Clayton affidavit, the number of poles was provided as of November 30, 1980.

(c) As a result of the above two changes, overall carrying charges, net investment per pole, revenue requirement per pole, and the two calculated rental rates differ slightly in the two affidavits.

Paragraphs 25-29 below focus on the flaws in Complainant's rate calculation methodology.

25. Complainant adjusts net pole investment by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. § 224(d)(1) speaks of costs "attributable to the entire pole," not the "bare pole." Respondent for the purposes of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Telephone Company of West* Virginia, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.

26. Complainant uses both plant depreciation reserve and gross investment figures and pole depreciation reserve and gross investment figures in converting pole maintenance expense from a percentage of gross investment to



a percentage of net investment. In contrast, Respondent uses gross pole and net pole investment figures alone for this purpose. Respondent makes assumptions based on total plant statistics only when necessary: since the ratio of gross pole investment to net pole investment is available, Respondent uses that more directly applicable ratio as a conversion factor. *See* Affidavit paragraph 12.

27. Respondent's method of calculating state and federal income taxes departs entirely from the Complainants' tax calculation method. Respondent's methodology is in accordance with the normalized tax methodology used by the Florida Public Service Commission, and avoids the often misleading results of the Complainant's method.[1] Explained in many sources, including American Telephone and Telegraph Company, *Engineering Economy*, 174-79 (3d ed. 1977), Respondent's methodology is conceptually similar to the approach accepted in another pole attachment proceeding, *TeleCable Development Corporation* v. *Appalachian Power Company*, No. 79-0007, ¶ 19 (Common Carrier Bureau, October 31, 1980). *See* Affidavit paragraph 14.

28. The Commission has ruled that cable uses no more than 1 foot of space, and that usable space must include all safety spaces between users. It is respectfully submitted that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable.[2] As paragraphs 20 and 21 of the Affidavit

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[1] Where a utility has negative income taxes for a given year, for example, Complainant's method would yield a negative income tax carrying charge.

[2] Respondent notes the particular injustice of Commission reliance on agreements which "generally make the CATV operators responsible for all pole replacement costs necessitated by subsequent installation of

show, if Complainant owned its own pole system it would incur considerably higher annual costs—even if it shared those costs with another user—than it now pays Respondent. Where more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainant a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, therefore, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage.

29. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.51, as compared to the $2.23 requested by the complaint.

30. An annual rate of $10.10 per pole would be a just and reasonable charge for Complainant's use of Respondent's poles. Respondent has developed this rate by positing the existence of an already-constructed pole system owned by Complainant and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. Assuming that Complainant could find another user to share pole costs equally, Complainant would pay an annual rate of $10.10 per pole to maintain its own pole system. *See* Affidavit paragraphs 20-21. That Complainant now pays a far lower rate under

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additional electric or telephone lines that reduce available safety space to less than 40 inches." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d at 71. Respondent's contractual agreements with Complainants contain no such provisions. Section 2.4 of these agreements refers to subsequent cable installation, not subsequent utility installation.



the terms of the agrement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainant's request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility customers to share in the savings Complainant derives from using Resondent's pole system rather than maintaining its own.

31. As paragraph 23 of the Affidavit demonstrates, the Complaint's depiction of Complainant as a "reliable" corporation for which a bonding requirement is "unnecessary" is entirely contradicted by a history of failures to make payments on time, and this year, to make payments at all. To cite one example, Pasco Associates Ven*ure in June of 1980 forwarded payment due in June of 1979, but has never forwarded the payment due in June of 1980. Complainant epitomizes the kind of company for which a bonding payment requirement is just, reasonable, and essential.

**IV. Procedural Requests**

32. Respondent requests that the Commission stay any further action in connection with the complaint in this case until the U.S. Court of Appeals for the D.C. Circuit has entered a decision on the pending appeal, Nos. 80-1483, 80-1490, 80-1499, of the Commission's *Adoption of Rules for the Regulation of Cable Television Pole Attachments, supra*. Like this response, the appeal of the Commission's Rules has focused upon the Commissioner's determination that the CATV operator may be charged with only one foot of pole space. Should the D.C. Circuit find merit in the appeal, a previous disposition of the instant complaint would stand to be largely susperseded. A stay therefore would avoid needless waste of the Commission's resources. Upon Commission grant of a stay, the Respondent will reserve sufficient funds to meet the relief requested by the complaint.

33. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the

several remedies requested by Complainant. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the few pole attachment complaints it has decided. *See, e.g., Teleprompter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," § 1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. §224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. lst Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainant without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainant's business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to gauge accurately the likely public benefits, if any, of the remedies sought by Complainant.

34. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainant's cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainant would not merely be profit for Complainant, but might also be passed on to Complainant's customers.



Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL (M.S.B.)
Allan J. Topol

/s/ MICHAEL S. BERNSTEIN
Michael S. Bernstein

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

*Attorneys for Respondent*

*Of Counsel*

Office of the General Counsel
Harry A. Evertz III
Senior Counsel
Florida Power Corporation
P. 0. Box 14042
St. Petersburg, Florida 33733

March 23, 1981

## Exhibit A

### LEGAL MEMORANDUM

**Commission Grant of the Relief Requested in the Complaint would Violate the Fifth Amendment of the United States Constitution by Taking Respondent's Property without Just Compensation and by Depriving Respondent of Property without Due Process of Law**

As interpreted by the Commission in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978), 72 F.C.C. 2d 59 (1979), 77 F.C.C. 2d 187 (1980), and applied in the resolution of certain other pole attachment disputes, the Pole Attachment Act, 47 U.S.C. § 224, allows the Respondent to charge cable television companies no more than $2.51—or according to Complainant's calculations, $2.23—annually per pole for the use of Respondent's poles, and thereby injures Respondent's right to rent space on its property at terms it finds satisfactory. This right constitutes "property" for the purpose of the Fifth Amendment's injunction against taking of private property for public use without just compensation:

> "The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denotes[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . .



> The constitutional provision is addressed to every sort of interest the citizen may possess.' *Id.*, at 377-378."

*Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 82 n.6 (1980).

In determining whether particular injuries to property are "takings" under the Fifth Amendment, the Supreme Court has engaged in essentially "ad hoc, factual inquiries", *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

> "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' *United States* v. *Eureka Mining Co.*, 357 U.S. 155, 168 (1958)."

*Id.*

Where the particular circumstances of a case support the conclusion that the challenged governmental action either "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land,. . . ." *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), a Fifth Amendment "taking" has occurred. Under the former test, the government has "taken" property unless its action both responds to the requirements of a substantial public interest and employs means reasonably necessary to the advancement of that interest. *Penn Central, supra*, 438 U.S. at 127 ("a use restriction on real property may

constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962) (" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals' ") (quoting *Lawton* v. *Steel*, 152 U.S. 133, 137 (1894)); *Chatham* v. *Jackson*, 613 F.2d 73, 78 (5th Cir. 1980) ("First, the public's interest must require the regulation. Second, the means must be reasonably necessary to accomplish the goal and not 'unduly oppressive' to individuals."). In *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), for example, the Supreme Court struck down the application of a zoning ordinance to the plaintiff's property as not bearing a substantial relation to the public health, safety, morals, or general welfare.

In reporting the Pole Attachment Act, the U.S. Senate Committee on Commerce, Science, and Transportation cited two purposes: "To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. lst Sess. 14 (1977). Commission grant of the relief requested in the Complaint would substantially advance neither the above two purposes, nor, indeed, any purpose required by the public interest.

The rates Respondent charges Complainant are fair, just and reasonable. As Paragraph 30 of the Response and Paragraphs 20-21 of the Affidavit show, if Complainant already owned its own pole system, the annual cost of upkeep would be $20.20 per pole. If Complainant could find another party to share its pole system, the annual cost to Complainant would be $10.10 per pole. The rate Respondent charges Complainant is nearly three dollars



less than the cost Complainant would incur by sharing the carrying charges of its own system with another party.

Complainant nonetheless requests the Commission to prohibit the current rate and all others exceeding 7.41%—a figure derived from the arbitrary assignment of only one foot of pole space to cable use—of Respondent's costs as unfair and unreasonable. If the public interest requires such governmental intervention, it also must require all sales and rentals of private property to be made at cost. The existing regulation of rates Respondent charges for the provision of electrical service cannot explain why complainant—unlike other buyers and renters—requires federal assurance of rock bottom prices at the expense of a private party's property rights. Like the rates Respondent charges in its employee cafeteria, or the rates a wholly unregulated company charges for its services, pole space rental rates have always rested in the property owner's discretion. Constitutional removal of pole attachment rates from Respondent's control requires more than a finding that existing rates, while affording Complainant a bargain, do not afford Complainant all the advantages Respondent's electrical power consumers derive from traditional utility regulation.[1]

The relief requested, then, cannot advance the purpose of preventing unfair pole attachment practices because Respondent's current practices are fair. For the same reason, the relief requested cannot advance the purpose of

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[1] Like the argument based on existing regulation of Respondent's electric rates, arguments based on evidence recorded in the Pole Attachment Act's legislative history fail to explain why the public interest requires giving Complainant, in contrast to other private buyers and renters, the use of private poles at cost. The Senate Committee noted evidence that utilities are in a position to extract unreasonably high rates and that the practices of telephone companies present the danger of competitive restraint, S. Rep. No. 95-580, 95th Cong. lst Sess. 13 (1977), but Respondent does not extract unreasonably high rates and is not a telephone company.

minimizing the effect of unjust pole attachment practices on the development of cable television services. The proposed means for achieving this second purpose suffer from an additional defect: there are no grounds for believing that the transfer of funds effected by the requested relief would spur cable television service. No evidence has been introduced to show that the continuation of Complainant's local cable service depends on the level of pole attachment rates. Indeed, Complainant apparently has operated successfully to date despite—or more appropriately, with the aid of—the contractual rate. Similarly, no evidence has been introduced to show that Complainant would use the additional funds to expand cable operations in Florida or elsewhere. Complainant well might distribute these funds as profit, or invest them in enterprises entirely unrelated to cable.

The only predictable effect of mandating a new rate, then, would be an increase in Complainant's funds. Quite apart from the injustice of asking Respondent to subsidize the growth of cable television, therefore, Commission grant of the relief requested might aid Complainant without in any way aiding cable or the public interest. This tenuous connection between means and ends in the Pole Attachment Act sharply contrasts with the more carefully tailored governmental actions considered and upheld in previous "takings" cases. *See, e.g. Andrus* v. *Allard*, 444 U.S. 51 (1979) (Eagle Protection Act forbids commerce in eagles after effective date); *Penn Central, supra* (program to preserve historical landmarks restricts development of privately owned historical landmarks).

The relief requested, in sum, would serve no public interest, much less substantially advance a purpose required by the public interest. The taking clause of the Fifth Amendment will not countenance an uncompensated taking serving only to enrich one private party at another's expense.



The defects inhering in Commission grant of the relief requested, as discussed above, in addition would violate the Fifth Amendment by depriving Respondent of property without due process of law. *See generally Pruneyard, supra*, at 84-85; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-25 (1978).

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL (M.S.B.)
Allan J. Topol

/s/ MICHAEL S. BERNSTEIN
Michael S. Bernstein

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Attorney for Respondent

*Of Counsel*

Office of the General Counsel
Harry A. Evertz III
Senior Counsel
Florida Power Corporation
P. 0. Box 14042
St. Petersburg, Florida 33733

March 23, 1981

**Exhibit B**

STATE OF FLORIDA )
COUNTY OF PINELLAS )

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**FILE NO. PA-81-0023**

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**AFFIDAVIT OF MATTHEW R. NOBLE**

BEFORE ME, the undersigned authority, on this day personally appeared Matthew R. Noble, who, after being sworn, deposes and says:

1. My name is Matthew R. Noble. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Engineering Technology from the University of South Florida, Tampa, Florida, and an Associate of Science degree in Electronics from St. Petersburg Junior College, St. Petersburg, Florida. I have been employed by Florida Power for the past eight years. My experience in that time has included one year in the area of system planning, four years in the area of scheduling and coordination, and three years in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and b) the Complaint filed by Acton CATV, Inc. d/b/a/ Brooksville Properties Venture



and Pasco Associates Venture ("Acton") against Florida Power, File No. PA-81-0023. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such Complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.51. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $10.10. Paragraphs 7-18 below explain the derivation of the first rate. Paragraphs 7-17 and 19-21 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure will appear under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for investment not essential to CATV results in net bare pole investment of $50,700, 713.

8. Florida Power owned 528,655 poles as of December 31, 1981. Net investment bare per pole, expressed as the quotient of net bare pole investment divided by the number

of poles owned by the Florida Power Corporation, was $95.91.

$$\frac{\text{Net Bare Pole Investment}}{\text{Number of Poles}} = \$95.91 = \text{Net Investment per bare pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, Federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The cost of capital (return) is the imbedded cost of capital computed by the Florida Public Service Comission method. The figure includes a debt component (long term debt & customer deposits at imbedded rates), an equity component (preferred stock at the imbedded rate and common stock at the allowed 14.6%), and an interest-free component which represents interest-free capital resulting from the deferral of federal income taxes.

| Return (Cost of Capital) | % of Capital | | Cost of Capital |
|---|---|---|---|
| Long-term Debt | .4567 | at | 8.81% |
| Preferred Stock | .1086 | at | 8.30% |
| Common Stock | .2929 | at | 14.6% |
| Cost Free Deferred Tax Credits | .1280 | at | 0% |
| Customer Deposits—Active | .0136 | at | 8% |
| Composite Cost of Capital | | | 9.31% |

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross pole investment in the FERC 364 & 365 accounts and multiplied by the gross pole/net pole investment conversion ratio. These FERC accounts will appear on FERC Form 1 for 1980.



$$\frac{\text{FERC 593 account}}{\text{FERC 364 \& 365 accounts}} = \frac{\$\ 10,531,432}{\$166,512,836} = 6.35\% = \text{Maintenance expense rate for gross investment}$$

$$6.35\% \times 1.4917 = 9.48\% = \text{Maintenance expense rate for net investment}$$

12. Calculation of administrative expenses begins with the division of total administrative expenses by gross plant investment. Because of the lack of more specific data, the analysis to this point assumes pole administrative expenses are to gross pole investment as total administrative expenses are to gross plant investment. In converting a gross administrative expense rate per pole to a net administrative expense rate per pole, however, such an assumption is no longer necessary. Instead of using a gross plant/net plant investment conversion ratio, a gross pole/net pole investment ratio is used. Both the total administrative expenses and the gross plant investment figures will appear on the FERC Form 1 for 1980.

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29,943,156}{\$2,078,396,138} = 1.44\% = \text{Administrative expense rate for gross investment}$$

$$1.44\% \times 1.4917 = 2.15\% = \text{Administrative expense rate for net investment}$$

13. The depreciation rate is calculated for straight-line depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized for FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

14. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The benefits of deferred taxes have been recognized in the calculation of the return: the required return on capital has been reduced by including an interest-free capital component of deferred taxes. The calculation of income taxes below is consistent with the Florida Public Service Commission method and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487
Debt/equity ratio = .4703
Composite cost of debt = 8.79
Composite cost of capital = 9.31
A/P = capital recovery
Average life = 22
Depreciation rate for gross investment = 4.55%

$$\text{Income Tax} = \left(\frac{.487}{1 - .487}\right)\left(1 - \frac{(.4703)(8.79)}{9.31}\right)\left((A/P, 9.31\%, 22 \text{ yrs.}) - 0.455\right)$$

Income Tax = 3.32% = Income tax rate for gross investment

3.32% x 1.4917 = 4.95% = Income tax rate for net investment

15. The "other" taxes for net investment are derived in the same way as administrative expenses. The calculation begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which will be reported on account 4.08.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which will be reported on



the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

$$\frac{\text{Other taxes (except for franchise fees)}}{\text{Gross Plant Investment}} = \frac{\$\ 36,940,257}{\$2,078,396,138} = 1.78\% = \text{Other rate for gross investment}$$

1.78% x 1.4917 = 2.65% = Other tax rate for net investment

16. Total carrying charges, 35.33%, equal the sum of the individual components derived above in paragraphs 10-15:

| | % of Net Pole Cost |
|---|---|
| Return (Cost of Capital) | 9.31 |
| Maintenance Expense | 9.48 |
| Administrative Expense | 2.15 |
| Depreciation | 6.79 |
| Federal & State Income Taxes | 4.95 |
| Other Taxes | 2.65 |
| Total | 35.33 |

17. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 16.

$95.91 x 35.33% = $33.88 = Annual revenue requirement per pole

18. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.51.

19. The present pole attachment rate of $7.15 is fair and just. It is much lower than the annual pole cost Acton would incur if it owned its own already-constructed pole system.

20. It is reasonable to assume that an Acton-owned pole system would resenble closely a telephone-owned pole sys-

tem, since both only require poles of minimal height. Exhibit C, paragraph 2, of the Complaint in the case of *Teleprompter Corporation and Teleprompter Southeast Corporation, Inc. v. Florida Power Corporation*, File No. PA-81-008, appended hereto as Exhibit A, showed a General Telephone Company of Florida net investment per pole of $57.18. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for an Acton-owned system equals the figure derived above for Florida Power. Multiplying net investment per pole by carrying costs yields an annual pole cost for an Acton-owned system of $20.20.

| | | |
|---|---|---|
| $57.18 x | 35.33% = | $20.20 |

21. If Acton were to share equally the costs of its pole system with another user, the annual cost for each party would be $10.10, still well above the rate Acton pays to Florida Power. Florida Power, far from abusing its bargaining power, charges Acton less than half of the rate Acton would pay annually for its own system.

22. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

23. Florida Power requires bonding payments from all cable companies renting pole attachments. Past and present experience with cable companies in general, and Acton in particular, proves the necessity for the protection bonding payments provide. Acton has been delinquent in its payments since the beginning of its contractual relationship with Florida Power. Not only have Pasco Associates Venture and Brookville Properties Venture failed to make payments due January 1, 1981, but Pasco Associates Venture has yet to make payments due June 30, 1980. Pasco



Associates Venture did make a payment on June 5, 1980: that payment was due June 30, 1979.

Signed this 19th day of March, 1981

/s/ MATTHEW R. NOBLE
MATTHEW R. NOBLE

Sworn to and subscribed before me
this 19th day of March, 1981.

/s/ Illegible
Notary Public

My Commission Expires:
December 28, 1983

AFFIDAVIT EXHIBIT A

## EXHIBIT C

### Calculation of Maximum Lawful Rate

1. *Net Investment in bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment minus pole depreceiation reserve, less an additional 15% to reflect that part of the gross plant attributable to cross arms and other items not usable for CATV attachments. It is assumed that the pole depreciation reserve bears the same ratio to gross pole investment as the total plant depreciation reserve bears to total plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \text{Ratio of Pole Depreciation Reserve to Gross Pole Investment}$$

$$\frac{\$414,191,834}{\$2,043,936,824} = 20.3\%$$

20.3% x Gross Pole Investment = Pole Depreciation Reserve

20.3% x $81,841,613 = $16,613,847

85% x (Gross Pole Investment - Pole Depreciation Reserve) = Net Investment in Bare Poles

85% x ($81,841,613 - $16,613,847) = $55,443,601

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles.

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$55,443,601}{?} = ?$$



Because the number of poles owned by Respondent is not publicly available, it is assumed that Respondent's net investment per bare pole is no greater than that of its geographic neighbor, General Telephone Company of Florida.

From information available on FCC Form M for the year ending December 31, 1979, General Telephone's net investment per pole can be shown to be $57.18, following the formula prescribed by the Commission in Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, No. 80-372 (F.C.C., July 19, 1980). Gross pole investment is $11,915,853. Form M at 19 line 11, col. (h). The ratio of the pole depreciation reserve to gross pole investment can be estimated by finding the ratio of the depreciation reserve for all plant to gross plant investment.

$$\frac{\text{Plant Depreciation Reserve}}{\text{Gross Plant Investment}} = \frac{\$387,662,630}{\$1,770,647,179} = 21.9\%$$

Form M at 12 line 6, col.(c) & 19 line 23, col.(b).

21.9% x Gross Pole Investment = Pole Depreciation Reserve

21.9% x $11,915,853 = $2,609,572

85% x (Gross Pole Investment -Pole Depreciation Reserve) = Investment in bare Poles

85% x (11,915,853 - 2,609,572) = $7,910,339

$$\frac{\text{Net Investment in Bare Poles}}{\text{Number of Poles}} = \text{Net Investment per Bare Pole}$$

$$\frac{\$7,910,339}{138,332} = \$57.18$$

Number of poles: Form M at 74 line 1, col. (n).

3. *Carrying Charge.* Carrying Charge is composed of maintenance expenses, depreciation, administrative expense, taxes, and cost of capital.

a. *Maintenance Expense.* Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual pole maintenance expense by the net pole investment (gross pole investment less depreciation reserve).

$$\frac{\text{Pole Maintenance Expense}}{\text{(Gross Pole Investment} - \text{Depreciation Reserve)}} = \text{Maintenance Expense (expressed as a percentage of net pole investment)}$$

$$\frac{\$8,107,911}{(\$81,841,613 - \$16,513,847)} = 12.4\%$$



## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Response" have been mailed, postage prepaid, this 23rd day of March, 1981, to the following:

GARDNER F. GILLESPIE, ESQ.
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006
Attorney for Complainant

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Michael S. Bernstein
Michael S. Bernstein

March 23, 1981

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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**File No. PA-82-0005**

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In re

COX CABLEVISION CORP. d/b/a
HIGHLANDS CABLE TV,

*Complainant,*

v.

FLORIDA POWER CORP.,

*Respondent.*

To: The Common Carrier Bureau

## COMPLAINT

### Parties

1. Complainant Cox Cablevision Corp. d/b/a Highlands Cable TV owns and operates a cable television system serving the communities of Avon Park, Sebring, and unincorporated areas of Highlands and Marion County, Florida. The address of Complainant's is P. O. Box 229, Sebring, Florida, 33870.

2. Respondent Florida Power Corp. is engaged in the provision of electric power service in portions of the State of Florida. Respondent's general office address is 3201 - 34th Street South, P. O. Box 14042, St. Petersburg, Florida, 33733.

### Jurisdiction

3. The Commission has jurisdiction over this complaint and over Respondent pursuant to Section 224 and other



provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et. seq* (1970).

4. Respondent owns or controls utility poles in Florida. Such poles are used for purposes of wire communications. Complainants' allege, upon information and belief, that Respondent is not owned by any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state.

5. Complainants allege, upon information and belief, and in reliance upon Commission lists published pursuant to § 1.1414(b) of the Commission's Rules, that neither the State of Florida, nor any of its political subdivisions, agencies, or instrumentalities, has certified to the Commission that it regulate the rates, terms, or conditions of pole attachments. The Florida Supreme Court has held that attempts by the Florida Public Service Commission to regulate pole attachments exceeded the Commission's jurisdiction. *TelePrompter Corp.* v. *Hawkins*, No. 56, 291 (Fla., May 29, 1980).

### Service

6. Attached hereto is a certificate of service on Respondent and each federal, state, or local government agency which regulates any aspect of service provided by Respondent.

### Agreement

7. In 1963 an agreement with Respondent was entered by which it was agreed that space would be made available on Respondent's poles for pole attachments as defined in § 1.1402(b) of the Commission's Rules. That agreement is attached hereto as Exhibit A. Pursuant to the agreement, Complainant was charged an annual rental of $5.50.**

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* Complainant is successor in interest to Highlands Cablevision Co. by virtue of its acquisition of the subject cable systems in 1969.

8. In 1978, Respondent approached Complainant with a proposed rate increase from $5.50 to $6.86. The parties entered into negotiation over the new rate, but were unsuccessful in reaching an agreement. Accordingly, by letter of March 20, 1979 (attached as Exhibit B), Respondent suspended Complainant's rights under the 1963 agreement insofar as additional pole attachments are concerned. Complainant's attachments in existence at that time, however, have remained on the poles and from 1979 through the most recent semi-annual invoicing in June, 1981, Respondent has charged Complainant in accordance with § 8.1 of the 1963 agreement, a provision governing rates in the event of a dispute over an increase. Despite Respondent's purported suspension of rights, the terms and conditions of the 1963 agreement appear to have continued governing all other aspects of the relationship between the parties. As of June 30, 1981, there were 2033 poles subject to this agreement.

**Unjust and Unreasonable Rates**

9. In 1979, pursuant to a provision in the agreement governing rates in the event of a dispute, Respondent began charging Complainant at the rate of $11.47 per pole. Complainant has, however, continued to pay at the original rate of $5.50 per pole. As will be demonstrated below, under the formula made applicable by Section 224(d)(1) of the Communications Act and Section 1.1409(c) of the Commission's Rules, not only the $11.47 rate currently being charged, but also the $6.86 rate proposed by Respondent in 1978 and the $5.50 rate which Complainant has been paying, are unjust and unreasonable. As the Commission recently ruled in *TelePrompter Corp.* v. *Florida Power Corp.*, (PA-81-008, July 16, 1981), and as the statutory formula establishes in this case, the maximum lawful rate that Respondent may charge for cable television pole attachments is $1.79 per pole.

10. The parties in this proceeding have been engaged in intermittent efforts to negotiate a settlement to their



dispute since 1978. From time to time, Complainant has requested and received data from Respondent, but much of that information is either inadequate for purposes of the Commission's formula or out of date. In August, 1981, Complainant again approached Respondent in an effort to reinstitute negotiations for a new rate. Because those efforts were firmly rebuffed (*See* Exhibit C) and because the necessary data has recently been produced by Respondent or developed by the Commission in response to other complaints and is now a matter of public record before the Commission, Complainant is relying on that information rather than making a superfluous request of Respondent for essentially the same data. The sources of individual items of information are identified in Exhibit D.

11. The first step in determining the maximum lawful rate is the calculation of the annual revenue requirement per pole. Respondent's figure for gross investment in pole plant, set forth in Exhibit D, includes poles, crossarms, and all appurtenant equipment whether or not used or useful for attachment of television cables. This figure must be reduced by the depreciation reserve from gross investment in pole plant to yield net investment in pole plant, and must be further reduced to remove net investment in crossarms and other equipment not used or useful for pole attachments. The calculations are set forth in Exhibit D.

12. Investment per bare pole must be multiplied by an annual carrying charge, expressed as a percentage, to determine the annual revenue requirement per pole. There are five components of the annual carrying charge: (1) cost of capital; (2) maintenance expense; (3) administrative costs; (4) depreciation; and (5) taxes. These components are derived in Exhibit D. The revenue requirement per pole is the product of the net investment per bare pole times the annual carrying charge.

13. To calculate what share of that revenue requirement the Respondent may charge to cable systems, it is necessary to determine two factors: the space used for a cable attachment and the average usable space per pole. As the Commission has found, there is no dispute that a CATV cable actually uses or occupies one foot of space. *Second Report and Order in CC Docket 78-114*, 72 F.C.C.2d 59, 70 n.26 (1979), *aff'd on reconsid.*, 77 F.C.C.2d 187, 190 (1980). No safety zones or other clearances may properly be assigned to the cable operator. 72 F.C.C.2d at 70. The Commission has also determined that, in the absence of other information, it is to be presumed that an average pole has 13.5 feet of usable space. 72 F.C.C. 2d at 69; *TelePrompter of Fairmont, Inc.* v. *Chesapeake & Potomac Tel. Co. of W. Va.*, 79 F.C.C.2d 232 (1980). *TelePrompter Corporation* v. *Northwestern Bell Telephone Co.*, Mimeo 000345 at ¶ 8 (Common Carrier Bureau, rel. April 21, 1981). In *TelePrompter Corporation* v. *Florida Power Corp.*, the Commission found the usable space per pole for this Respondent was 13.5 feet and the space occupied by the cable attachment was one foot, or 7.41 percent of the usable space on Respondent's poles.

14. Therefore, as set forth in Exhibit D, the maximum lawful annual rate which Respondent may charge is the product of its net investment per pole ($95.91) times its annual carrying charge (25.236%) times the percentage of usable space occupied (7.41%). Accordingly, as the Commission found in the *TelePrompter* case, the maximum just and reasonable rate permissible under 47 U.S.C. §224(b)(1) is 1.79 per pole. Any rates charged by Respondent in excess thereof are unjust and unreasonable, and therefore unlawful. *TelePrompter Corporation* v. *Northwestern Bell Telephone Co., supra.*

15. As explained above, Respondent is attempting to charge Complainant an annual rental rate of $11.47 or $6.86 per pole. Complainant submits that either rate is



unlawful in that it exceeds the calculated maximum lawful annual rate.

**Settlement Efforts**

16. As noted above, efforts to resolve this dispute have been on-going since 1978, and by letter of September 2, 1981, Respondent made it clear that further settlement negotiations would prove fruitless.

17. Complainant respectfully requests that:

a. The Commission determine that the maximum rate Respondent may lawfully charge is $1.79 per pole per year;

b. The present rate, being in excess thereof, be terminated pursuant to 47 C.F.R. §1.1410(a);

c. The Commission, pursuant to 47 C.F.R. §1.1410(b), substitute an annual rate of $1.79 per pole in the agreement attached hereto as Exhibit A or in such other agreement the parties may enter; and

d. Respondent be ordered, pursuant to 47 C.F.R. §1.1410(c), to refund to Complainant the amount Complainant has paid to Respondent in excess of the maximum lawful rate for the period from the date hereof, plus interest.

Respectfully submitted,

COX CABLEVISION CORP. d/b/a/
HIGHLANDS CABLE TV

By /s/ Charles H. Helein (D.C.G.)
Charles H. Helein

/s/ Donna C. Gregg
Donna C. Gregg

Its Attorneys

*Of Counsel:*

DOW, LOHNES & ALBERTSON
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-8000

November 2, 1981



**Exhibit A**

**ATTACHMENT AGREEMENT**
**BETWEEN**
**FLORIDA POWER CORPORATION**
**AND**
**HIGHLANDS CABLEVISION COMPANY**
**(A Division of McLendon Cablevision Company)**

*Section 0.1* THIS AGREEMENT, made and entered into this 20th day of June, 1963, by and between Florida Power Corporation, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Electric Company," and Highlands Cablevision Company, a corporation organized and existing under the laws of the State of Florida, herein referred to as the "Television Company."

**WITNESSETH**

*Section 0.2* WHEREAS, the Television Company proposes to furnish television distribution service to residents of Avon Park, Florida, and surrounding service area, and will need to erect and maintain aerial cables, wires and associated appliances throughout the area to be served and desires to attach such cables, wires and appliances to poles of the Electric Company.

*Section 0.3* WHEREAS, the Electric Company is willing to permit, to the extent it may lawfully do so, the attachment of said cables, wires and appliances to its existing poles where, in its judgment, such use will not interfere with its own service requirements, including consideration of economy and safety.

*Section 0.4* NOW THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained,

the parties hereto for themselves and for their successors and assigns do hereby mutually covenant and agree as follows:

## ARTICLE I

## SCOPE OF AGREEMENT

*Section 1.1* This agreement shall be in effect in the portion of Highlands County including the City of Avon Park and the surrounding area in which the Electric Company provides distribution service.

*Section 1.2* The Electric Company reserves the right to deny the attachments of cables, wires and appliances to its poles by the Television Company which have been installed for purposes other than or in addition to normal distribution of electric service including, among others, poles which in the judgment of the owner (i) are required for the sole use of the owner, (ii) would not readily lend themselves to attachments by the Television Company because of interference, hazards or similar impediments, present or future, or (iii) have been installed primarily for the use of a third party.

*Section 1.3* Pursuant to the right provided for in the foregoing section, the Electric Company hereby excludes its poles used to support its transmission lines and having no attachments thereon for local electric distribution.

## ARTICLE II

## PLACING, TRANSFERRING OR REARRANGING ATTACHMENTS

*Section 2.1* Before making attachment to any pole or poles of the Electric Company, the Television Company shall make application and receive a permit therefore in the form of Exhibit A, hereto attached and made a part hereof.



*Section 2.2* The Television Company shall, at its own expense, make and maintain said attachments in safe condition and in thorough repair, and in a manner suitable to the Electric Company and so as will not conflict with the use of said poles by the Electric Company, or by other utility companies using said poles, or interfere with the working use of facilities thereon or which may from time to time be placed thereon. The Television Company shall at any time, at its own expense, upon notice from the Electric Company, relocate, replace or renew its facilities placed on said poles, and transfer them to substituted poles, or perform any other work in connection with said facilities that may be required by the Electric Company; provided, however, that in cases of emergency, the Electric Company may arrange to relocate, replace or renew the facilities placed on said poles by the Television Company, transfer them to substituted poles or perform any other work in connection with said facilities that may be required in the maintenance, replacement, removal or relocation of said poles, the facilities thereon or which may be placed thereon, or for the service needs of the Electric Company, and the Television Company shall, on demand, reimburse the Electric Company for the expense thereby incurred. Nothing in this paragraph is to relieve the Television Company of maintaining adequate work forces readily at hand to promptly repair, service and maintain the Television Company's facilities where such condition is hindering the Electric Company's operations.

*Section 2.3* The Television Company's cables, wires and appliances, in each and every location, shall be erected and maintained in accordance with the requirements and specifications of the National Electrical Safety Code, or any amendments or revisions of said Code. Drawings marked Exhibits C to J, inclusive, when not in conflict with specifications of the Electric Company, attached hereto and made a part hereof, are descriptive of required construction under some typical conditions, where span lengths are

not over three hundred fifty feet (350') and voltage between any conductor and ground does not exceed eight thousand seven hundred (8,700) volts.

*Section 2.4* In the event that any pole or poles of the Electric Company to which the Television Company desires to make attachments are inadequate to support the additional facilities in accordance with the aforesaid specifications, the Electric Company will indicate on said Exhibit A the changes necessary to provide adequate poles and the estimated cost thereof to the Television Company and return it to the Television Company and if the Television Company still desires to make the attachments and returns the Exhibit marked to so indicate together with an advance payment to reimburse the Electric Company for the entire estimated non-betterment portion of the cost and expense thereof, including the increased cost of larger poles, sacrificed life value of poles removed, cost of removal less any salvage recovery and the expense of transferring the Electric Company's facilities from the old to the new poles, the Electric Company will replace such inadequate poles with suitable poles. Where the Television Company's desired attachments can be accommodated on present poles of the Electric Company by rearranging the Electric Company facilities thereon, the Television Company will compensate the Electric Company in advance for the full estimated expense incurred in completing such rearrangements. The Television Company will also in advance reimburse the Owner or Owners of other facilities attached to said poles for any expense incurred by it or them in transferring or rearranging said facilities. Any strengthening of poles (guying) required to accommodate the attachments of the Television Company shall be provided by and at the expense of the Television Company and to the satisfaction of the Electric Company. The Television Company shall not set intermediate poles under or in close proximity to the Electric Company's facilities. The Television Company may, however, request the Electric



Company to set such intermediate poles as the Television Company may desire, and the Electric Company shall have the option to accept or reject such request. If such request is granted, the Television Company shall reimburse the Electric Company for the full cost of setting such pole or poles.

*Section 2.5* The Electric Company reserves to itself, its successors and assigns, the right to maintain its poles and to operate its facilities thereon in such manner as will best enable it to fulfill its own service requirements, and in accordance with the National Electrical Safety Code or any amendments or revisions of said Code and such specifications particularly applying to the Electric Company hereinbefore referred to. The Electric Company shall not be liable to the Television Company for any interruption to service of the Television Company or for interference with the operation of the cables, wires and appliances of the Television Company arising in any manner out of the use of the Electric Company's poles hereunder.

*Section 2.6* The Television Company shall exercise special precautions to avoid damage to facilities of the Electric Company and of others supported on said poles; and hereby assumes all responsibility for any and all loss for such damage caused by the Television Company. The Television Company shall make an immediate report to the Electric Company of the occurrence of any damage and hereby agrees to reimburse the Electric Company for the expense incurred in making repairs. Damage to plant or facilities of the Television Company or damage to equipment of subscriber to the Television Company's service, arising from accidental contact with the Electric Company's energized conductors, shall be assumed by the Television Company.

## ARTICLE III

## EVIDENCE TO OPERATE FROM GOVERNMENT AND MUNICIPAL AUTHORITIES

*Section 3.1* The Television Company shall submit to the Electric Company evidence, satisfactory to the Electric Company, of its authority to erect and maintain its facilities within public streets, highways and other thoroughfares and shall secure any necessary consent from state or municipal authorities or from the owners of property to construct and maintain facilities at the locations of poles of the Electric Company which it desires to use.

## ARTICLE IV

## RIGHT OF WAY FOR TELEVISION COMPANY'S ATTACHMENTS

*Section 4.1* While the Electric Company and the Television Company will cooperate as far as may be practicable in obtaining rights of way for both parties on the Electric Company's poles, no guarantee is given by the Electric Company of permission from property owners, muncipalities or others for use of poles and right of way easement by the Television Company, and if objection is made thereto and the Television Company is unable to satisfactorily adjust the matter within a reasonable time, the Electric Company may at any time upon thirty (30) days notice in writing to the Television Company, require the Television Company to remove its attachments from the poles involved and its appliances from the right of way easement involved and the Television Company shall, within thirty (30) days after receipt of said notice, remove its attachments from said poles and its appliances from said right of way easement at its sole expense. Should the Television Company fail to remove its attachments and applicances, as herein provided, the Electric Company way remove them without liability for loss or damage and the Television



Company shall reimburse the Electric Company for the expense incurred.

## ARTICLE V

## INSPECTION

*Section 5.1* The Electric Company, because of the importance of its service, reserves the right to inspect each new installation of the Television Company on its poles and in the vicinity of its line or appliances and to make periodic inspections, semiannually or oftener [*sic*] as plant conditions may warrant, of the entire plant of the Television Company; and the Television Company shall, on demand, reimburse the Electric Company for the expense of such inspections at the rate equal to the present or future hourly rate of a journeyman lineman plus loading costs per manhour. Such inspections, made or not, shall not operate to relieve the Television Company of any responsibility, obligation or liability assumed under this agreement. Provided, however, that such inspections, as to payment by the Television Company to the Electric Company, shall be limited to not more than one inspection each calendar year during the period covered by the agreement.

*Section 5.2* Bills for inspections, expenses and other charges under this agreement, except those advance payments specifically covered herein, shall be payable within thirty (30) days after presentation. Non-payment of bills shall constitute a default of this agreement.

*Section 5.3* The Television Company shall furnish bond to guarantee the payment of any sums which may become due to the Electric Company for rentals, inspections or for work performed for the benefit of the Television Company under this agreement including the removal of attachments upon termination of this agreement by any of its provisions; as provided on the attached Schedule of Required Bond Coverage.

## ARTICLE VI

## ABANDONMENT AND REMOVAL OF ATTACHMENTS

*Section 6.1* The Television Company may at any time remove its attachments from any pole or poles of the Electric Company, but shall immediately give the Electric Company written notice of such removal in the form of Exhibit B, hereto attached and made a part hereof. No refund of any rental will be due on account of such removal, nor proration made for less than one-half year.

*Section 6.2* Upon notice from the Electric Company to the Television Company that the use of any pole or poles is forbidden by municipal authorities or property owners, the permit covering the use of such pole or poles shall immediately terminate and the cables, wires and appliances of the Television Company shall be removed at once from the affected pole or poles.

*Section 6.3* If the Television Company shall fail to comply with any of the provisions of this agreement including the specifications hereinbefore referred to, or default in any of its obligations under this agreement and shall fail within thirty (30) days after written notice from the Electric Company to correct such default or non-compliance, the Electric Company may, at its option, forthwith terminate this agreement or the permit covering the poles as to which such default or non-compliance shall have occurred. In case of such termination, a proportionate refund of all prepaid rentals shall be made.

## ARTICLE VII

## RENTAL AND PROCEDURE FOR PAYMENTS

*Section 7.1* The Television Company shall pay to the Electric Company, for attachments made to poles under this



agreement, a rental at the rate of Five Dollars and Fifty Cents ($5.50) per pole per year. Said rental shall be payable semiannually in advance on the first day of January and the first day of July of each year during which this agreement remains in effect. Semiannual rental payments shall be based upon the number of poles on which attachments are being maintained on the first day of June and the first day of December, respectively. The first payment of rental hereunder shall include such prorata amount as may be due for use of poles for the effective date hereof.

## ARTICLE VIII

## PERIODICAL REVISION OF ATTACHMENT PAYMENT RATE

*Section 8.1* At the expiration of three (3) years from the date of this agreement and at the end of every three (3) year period thereafter, the rate per attachment per pole shall be subject to revision at the request of either party made in writing to the other not later than sixty (60) days before the end of any such three (3) year period. If within sixty (60) days after the receipt of such request by either party from the other, the parties hereto fail to agree upon a revision of such rate, the then adjustment rate per pole to be paid during the next three (3) year period shall be (i) the rate per pole in effect for the then current three (3) year period, or (ii) an amount equal to one-half of the then average annual total cost per pole of installing and maintaining the standard poles on which the Television Company has attachments whichever amount is higher. In case of a revision of the adjustment rate as herein provided, the new rate shall be applicable until again revised.

## ARTICLE IX

## DEFAULTS

*Section 9.1* If the Television Company shall default in any of its obligations under this agreement and such default

shall continue for thirty (30) days after notice thereof in writing from the Electric Company, all rights of the Television Company hereunder shall be suspended including its right to occupy the Electric Company's poles, and if such default shall continue for a period of thirty (30) days after such suspension, the Electric Company hereunder may forthwith terminate this agreement.

## ARTICLE X

## LIABILITY

*Section 10.1* As a safeguard in respect to the foregoing agreement, the Television Company will carry Workmen's Compensation Insurance in the maximum amounts required by statute and will also carry policies of insurance acceptable to the Electric Company with respect to (i) general liability with bodily injury limits not less than $200,000 each person and $500,000 each accident and with property damage limits not less than $50,000 each accident and $100,000 aggregate and (ii) automobile and bodily injury limits not less than $200,000 each person and $500,000 each accident and with property damage limits not less than $25,000. The Television Company will cause these insurance policies mentioned in (i) and (ii) respectively to be endorsed by the Television Company's insurance carrier to provide blanket contractual coverage expressly with respect that the Television Company will assume full responsibility for the work and labor to attach cables, wires and appliances to poles of the Electric Company and will defend the Electric Company and hold the Electric Company harmless against and indemnify the Electric Company for any and all accidents or damages or claims or costs whatsoever arising within the scope thereof or in carrying out this agreement irrespective of negligence, actual or claimed, on the part of the Electric Company to the full limits of and for the liabilities insured under said policies. Prior to the Television Company making any attachments to poles of the Electric Company, the Television Company will furnish the Electric Company with certificates acceptable to the Electric Company from the Television Company's insurance carrier showing that the Television Company carries the requisite insurance and that the specified policies have been endorsed as above provided. Said certificates shall also provide that such insurance shall not be terminated, changed or endorsed except upon twenty (20) days written notice thereof to the Electric Company.



## ARTICLE XI

## EXISTING RIGHTS OF OTHER PARTIES

*Section 11.1* Nothing herein contained shall be construed as affecting the rights or privileges previously conferred by the Electric Company, by contract or otherwise, to others, not parties to this agreement, to use any poles covered by this agreement; and the Electric Company shall have the right to continue and extend such rights or privileges. The attachment privileges herein granted shall at all times be subject to such existing contracts and arrangements.

## ARTICLE XII

## TERM OF AGREEMENT

*Section 12.1* This agreement shall become effective upon its execution and if not terminated in accordance with the provisions of Section 6.3 shall continue in effect for a term of not less than one (1) year. Either party may terminate the agreement at the end of said year or at any time thereafter by giving to the other party at least six (6) months written notice. Upon termination of the agreement in accordance with any of its terms, the Television Company shall immediately remove its cables, wires and ap-

pliances from all poles of the Electric Company. so removed, the Electric Company shall have the right to remove them at the cost and expense of the Television Company and without any liability therefore.

## ARTICLE XIII

## ASSIGNMENT OF RIGHTS

*Section 13.1* The Television Company shall not assign, transfer or sublet the privileges hereby granted without the prior consent in writing of the Electric Company.

*Section 13.2* No use, however extended, of the Electric Company's poles, under this agreement, shall create or vest in the Television Company any ownership or property rights in said poles, but the Television Company's rights therein shall be and remain a mere license. Nothing herein contained shall be construed to compel the Electric Company to maintain any of said poles for a period longer than demanded by its own service requirements. The Electric Company reserves the right to deny the licensing of certain poles to the Television Company.

## ARTICLE XIV

## WAIVER OF TERMS OR CONDITIONS

*Section 14.1* Failure to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto, by their respective officers thereunto duly authorized, on the day and year first above written.



(Seal)
Attest

By /s/ Illegible
Secretary

FLORIDA POWER CORPORATION

By /s/ H. K. McKEAN
Senior Vice President

(Seal)
Attest

By /s/ Illegible
Assistant Secretary

HIGHLANDS CABLEVISION COMPANY, INC.

By /s/ Illegible
President

## SCHEDULE OF REQUIRED BOND COVERAGE

| Number of Attachments | Amount of Coverage |
|---|---|
| 0 - 500 | $ 5,000 |
| 501 - 1000 | $10,000 |
| 1001 - 1500 | $15,000 |
| 1501 - 2000 | $20,000 |
| 2001 - 2500 | $25,000 |
| Over 2500 | $35,000 |



## EXHIBIT A

## ATTACHMENT RENTAL CONTRACT FOR TELEVISION COMPANY CABLE SYSTEM HIGHLANDS CABLEVISION COMPANY - FLORIDA POWER CORPORATION

**Application and Permit**

_____, 19 ____

_____

In accordance with the terms of agreement dated ____, 19 ____ , application is hereby made for license to make attachments to the following poles:

Location: City _____ County_____ , Florida

| Pole Number | Pole Locations (Describe Fully) |
|---|---|

By _____

Title _____
Highlands Cablevision Company

License granted _____, 19____, subject to your approval of the following changes and rearrangements at an estimated cost to your of $_____ payable in advance,

License denied under Section 13.2, _____ , 19____.

The above changes and rearrangements approved and advance payment therefore enclosed

_____

By _____

Title _____

By _____

Title _____

Permit No. _____

Total Previous Poles _____

Poles This Permit _____

New Total _____



## EXHIBIT B

## ATTACHMENT RENTAL CONTRACT FOR TELEVISION COMPANY CABLE SYSTEM HIGHLANDS CABLEVISION COMPANY - FLORIDA POWER CORPORATION

### Notification of Removal by Television Company

_____, 19____

_____

In accordance with the terms of agreement dated ____, 19____ , kindly cancel from your records the following poles covered by Permit No. _____ from which attachments were removed on _____, 19____.

Location: City _____ County _____ , Florida

| Pole Number | Permit No. | Pole Location |
|---|---|---|

By _____

Title _____

Highlands Cablevision Company

Notice Acknowledged

_____, 19____

By _____

Title _____

Notice No. _____

Total Poles Discontinued This Notice _____

Poles Previously Vacated _____

Total Poles Vacated to Date _____

**Exhibit B**

FLORIDA
POWER
CORPORATION

March 20, 1979

*CERTIFIED MAIL*

Mr. Robert O. Frier, Manager
Highlands Cable Television Corporation
Post Office Box 229
Sebring, FL 33870

Dear Mr. Frier:

Semi-Annual Billing for Attachments on Poles of Florida Power Corporation for Period January 1, through June 30, 1979

January 4, 1979 we sent a letter and invoice for billing in amount of $11,371.43, covering television distribution attachments in the Avon Park, Florida area. February 15, 1979, a letter was sent to your company acknowledging receipt of your Check #59477, in the amount of $5,549.50. We accepted this check as partial payment and advised Highlands Cable Television Corporation that you were now delinquent in payment in the amount of $5,821.93. You were further advised your company was in default of our attachment agreement dated June 20, 1963.

This default has continued for a period of over thirty (30) days after notice in writing to you from Florida Power Corporation. Therefore, in accordance with the provisions of Section 9.1 of the aforementioned agreement, Florida Power Corporation suspends all-rights of the television company including its right to occupy the electric company's poles.

We have been attempting for over a year to negotiate a mutually acceptable rental attachment rate with your company and remain optimistic that this matter will eventually be resolved. However, during the interim period we are requesting our division engineering office in Lake Wales to allow no further attachments by the television company to poles of Florida Power Corporation.



Very truly yours,

FLORIDA POWER CORPORATION

/s/ W. H. OSBORNE
W. H. OSBORNE
Joint Use Specialist
Real Estate Department

WHO/jc
cc: Mr. T.S. Ricketts

**Exhibit C**

FLORIDA
POWER
CORPORATION

September 2, 1981

Claus Kroeger
Cox Cable Communication
Business Manager
219 Perimeter Center Pkwy
Atlanta, Ga. 30346

Mr. Kroeger:

This is to acknowledge receipt of your letter dated 8-11-81. As you may not be aware, from reading your letter, Cox Cable (Highlands Cable Television Corp.) is under suspension as defined under Section 8.1 of the contract dated 6-20-63 between Florida Power Corporation and Highlands Cable Television Corporation. Under this aforementioned agreement the rate of $11.47 was established and is now being invoiced. It appears Section 8.1 of the contract was invoked by Florida Power Corporation after lengthy negotiation failed to conclude a mutual agreement. This section of the contract was reluctantly used by Florida Power Corporation after a final attempt to compromise through establishing an equitable pole rate of $6.86 was refused by Cox Cable.

In light of the present review action being taken by the Common Carrier Bureau of the FCC, we have not changed our position as the rate now requested of $6.86/pole annually. Florida Power Corporation is maintaining that this annual attachment rate is fair and just.

As of this date your outstanding balance is $40,738.73, which should be cleared up prior to addressing any further mutual resolution.



On behalf of Florida Power Corporation I would like to thank you for any assistance you are able to render in rectifying this situation.

Sincerely,

/s/ M. RICHARD NOBLE
M. RICHARD NOBLE

Manager Liaison &
Joint Use Affairs
Real Estate Dept., H-5

MRN/jit

## EXHIBIT D

### Calculation of Maximum Lawful Rate

1. *Net Investment in Bare Poles.* Net investment in bare poles may be expressed as the difference of gross pole investment less pole depreciation reserve (net pole investment), less 15% of the net pole investment to take into account that part of the pole plant attributable to crossarms and other items not usable for CATV attachments.

| | |
|---|---|
| $ 88,975,480 | Gross Pole Investment |
| 29,327,582 | Pole Depreciation Reserve |
| $ 59,647,898 | Net Pole Investment |
| x85% | (15% of Investment for Non-CATV facilities) |
| $ 50,700,713 | Net Investment in Bare Poles |

2. *Net Investment Per Bare Pole.* Net investment per bare pole may be expressed as the quotient of net investment in bare poles divided by the number of poles from which net investment is calculated.

$ 50,700,713 = Net Investment in Bare Poles
528,655 Poles
= $ 95.91 Net Investment Per Pole.

3. *Carrying Charge.* The carrying charge consists of rate of return, maintenance expense, administrative expense, depreciation, and taxes.

a. *Rate of Return*: In *TelePrompter Corp.* v. *Florida Power Corp.*, PA-81-0008, Respondent specified and the Commission accepted a rate of return of 9.31%.

b. *Maintenance Expenses*: Maintenance expense for poles may be expressed as a percentage of net investment by dividing the annual expense of overhead line maintenance by the sum of the gross pole investment, investment in overhead conductors and devices and the cost of services. This figure is then multiplied by The Gross-to-Net Pole Investment Conversion Ratio.



| | | |
|---|---|---|
| (1) | $ 8,975,480 | Gross Pole Investment |
| | +77,357,356 | Investment in Overhead Conductors/ Devices |
| | +69,424,614 | Services |
| | $156,757,450 | |
| (2) | $ 10,581,432 / $156,757,450 | Overhead Line Maintenance Expense = 4.48% |
| (3) | 4.48% x 1.4917 = 6.69% | (Gross-to-Net Pole Investment Ratio) |

c. *Administrative Expense*: Administrative Expense, as a percentage of net pole investment, is expressed by dividing Total Administrative Expense by Total Gross Plant Investment and multiplying that figure by the Gross-to-Net *Plant* Conversion Ratio:

| | | |
|---|---|---|
| (1) | $ 8,018,299 | Administrative & General Salaries |
| | 3,459,402 | Office Supplies and Expenses |
| | (-29,030) | Administrative Expenses Transferred |
| | 305,316 | Regulatory Commission Expenses |
| | $ 11,753,917 | Total Administrative Expense |

(2) $ 11,753,917 / 2,078,396,138 = 0.56%

(3) 0.56% x 1.297 = 0.726%

d. *Depreciation*: In *TelePrompter Corp.* v. *Florida Power Corp.* (PA-81-008), *supra*, Respondent claimed and the Commission accepted a depreciation rate of 6.79% [Quotient of 1 minus salvage value (0) divided by an average useful life of 22 years] multiplied by the Gross-to-Net Pole Investment Ratio Factor:

(1) 1 - 0 / 22 = 4.55%

(2) 4.55% x 1.4917 = 6.79%

e. *Taxes*: Taxes are expressed as a percentage of net pole investment by dividing the total of federal income

tax, state income tax, and ad valorem taxes *actually paid* by the gross plant investment. This figure is then multiplied by the Gross-to-Net Plant Conversion Ratio. It is assumed that net pole expense bears the same relationship to tax expense as it does to net plant investment.

| | | |
|---|---|---|
| (1) | $ 1,123,825 | State Income Taxes |
| | +(-26,867,971) | Federal Income Tax |
| | + 53,373,765 | Ad Valorem Taxes |
| | 27,629,619 | Total Taxes Paid |

(2) $\frac{27,629,619}{2,078,396,138}$ = 1.32%

(3) 1.32% x 1.297 = 1.72%

f. *Total Carrying Charges*:

| | |
|---|---|
| 9.31% | Rate of Return |
| 6.69% | Maintenance Expense |
| 0.726% | Administrative Expense |
| 6.79% | Depreciation |
| 1.72% | Taxes |
| 25.236% | TOTAL CARRYING CHARGES |

4. *Use Ratio.* The use ratio may be expressed as the quotient of the space occupied by CATV (1 foot) divided by the total usable space (13.5 feet). *See TelePrompter Corp.* v. *Florida Power Corp.*, PA-81-008, *supra.*

$\frac{1 \text{ Foot}}{13.5 \text{ Feet}}$ = 7.41%

5. *Maximum Rate.* The maximum rate is the product of the net investment per bare pole times the carrying charge times the use ratio.

| | |
|---|---|
| $ 95.91 | Net Investment Per Bare Pole |
| x 25.236% | Carrying Charge |
| x 7.41% | Use Ratio |
| $ 1.79 | |



SOURCE OF DATA

| Item | Figure | Source |
|---|---|---|
| Gross Pole Investment | $88,975,480 | FERC Form 1 (Dec. 31, 1980), Electric Plant in Service, p. 402, l. 59, col. (g) |
| Pole Depreciation Reserve | $29,327,582 | *Id.*, Schedule B, Summary of Utility and Accumulated Provisions for Depreciation, Amortization, and Depletion, p. 113, l. 13, col. (b) |
| Number of Bare Poles | 528,655 | Respondent's Affidavit in "Motion for Leave to File" of March 25, 1981. FCC File No. PA-81-008, p. 3, 8 |
| Rate of Return | 9.31% | Respondent's Affidavit in "Response" of Jan. 27, 1981 in PA-81-008, p. 3, ¶10 |
| Maintenance of Overhead Lines | $10,581,432 | FERC Form 1 (Dec. 31, 1980) Acct. 593 p. 419, l. 118 |
| Investment in Poles, Towers, Fixtures | $88,975,480 | FERC Form 1 (Dec. 31, 1980) Acct. 364 Electric Plant in Service p. 402, l. 59, col. (g) |
| Investment in Overhead Conductors, Devices | $77,537,356 | *Id.*, p. 402, l. 60, col. (g) |
| Services | $69,424,614 | *Id.*, p. 402, l. 64, col. (g) |

| | | |
|---|---|---|
| Administrative & General Salaries | $ 8,018,229 | FERC Form 1 (Dec. 31, 1980), Electric Operating & Maintenance Expense, Acct. 920 p. 419, l. 150, col. (b) |
| Office Supplies & Expenses | $ 3,459,402 | *Id.*, Acct. 921 p. 419, l. 151, col. (b) |
| Administrative Expenses Transferred (Credit) | ($-29,030) | *Id.*, Acct. 922 p. 419, l. 152, col. (b) |
| Regulatory Commission Expenses | $305,316 | *Id.*, Acct. 928 p. 419, l. 158, col. (b) |
| Gross Electric Plant Investment | $2,078,346,138 | FERC Form 1 (Dec. 31, 1980) Statement B, Summary of Utility Plant and Accumulated Provisions for Depreciation, Amortization, and Depletion p. 113, l. 7, col. (b) |
| Plant Depreciation Reserve | $475,940,294 | *Id.* p. 113, l. 13, col. (b) |
| Ad Valorem Taxes | $53,373,765 | FERC Form 1 (Dec. 31, 1980) Statement of Income for Year Acct. 408.1 p. 113, l. 11, col. (c) |
| Federal Income Taxes | ($-26,867,971) | *Id.*, Acct. 409.1 p. 113, l. 12, col. (c) |
| State Income Taxes | ($1,123,825) | *Id.*, p. 113, l. 13, col. (c) |



## AFFIDAVIT

I, G.L. Davenport, an officer of Cox Cablevision Corp., on oath do state that I have read the foregoing complaint attached hereto; that I am familiar with the matters contained therein and know the purpose thereof; and that the facts set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ G. L. Davenport
G. L. Davenport

Subscribed and sworn to before me
this 23 day of October, 1981.

/s/ JAMES A. NATHAN
Notary Public
My commission expires on:
August 23, 1985

## AFFIDAVIT

I, G.L. Davenport, do hereby depose and state that I am Vice-President of Cox Cablevision Corp. d/b/a Highlands Cable T.V.; that I have reviewed the attached Complaint; that I am familiar with the matters set forth therein; and that the facts and circumstances as set forth are true and correct to the best of my knowledge, information, and belief.

/s/ G. L. DAVENPORT
G. L. Davenport

Subscribed and sworn to before me
this 23 day of October, 1981.

/s/ JAMES A. NATHAN
Notary Public

My commission expires on
August 23, 1985



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached "Complaint" has been sent this 2nd day of November, 1981, by first-class United States mail, postage prepaid, to the following:

Florida Power Corp.
3201 - 34th Street South
P.O. Box 14042
St. Petersburg, Florida 33733
Attn: M. Richard Noble
Manager Liaison & Joint Use Affairs
Real Estate Dept., H-5

/s/ DONNA C. GREGG
Donna C. Gregg, Esquire
Dow, Lohnes & Albertson
1225 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(202) 862-8075

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C.**

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**File No. PA-82-0005**

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In the Matter of

COX CABLEVISION CORP. d/b/a
HIGHLANDS CABLE TV

*Complainant,*

v.

FLORIDA POWER CORPORATION

*Respondent.*

TO: The Common Carrier Bureau

## RESPONSE OF FLORIDA POWER CORPORATION

Pursuant to Section 1.1407 of the Commission's Rules, Florida Power Corporation ("Respondent") hereby responds to the complaint of Cox Cablevision Corp. d/b/a/ Highlands Cable TV ("Complainant") filed on November 2, 1981.

This response is divided into four parts. In the first part, Respondent answers the specific allegations in the complaint. The second part raises constitutional objections to the Commission grant of the relief requested in the complaint. Notwithstanding these overriding objections, the third part presents two pole attachment rental rates, one calculated in accordance with prior Commission statements on methodology, and a second calculated in accordance with Respondent's conception of a fair and reasonable rate. The fourth and final part makes procedural and remedial requests designed to insure that any Commission action



comports with the goals of the Pole Attachment Act, 47 U.S.C. § 224 (Supp. II 1978).

Before turning to these specific parts of the response, it is important to fix the context of the dispute. At the heart of the case lies a contract between Complainant and Respondent for the rental of pole space for cable television attachments. Rates charged in accordance with that contract represent not the dictates of a regulatory regime, but a freely negotiated agreement between Complainant, and Respondent. The agreement benefits Complainant greatly, for the rate now in effect is much lower than the annual costs Complainant would incur if it owned its own pole system. Yet Complainant now asks the Commission to abrogate the contract and impose a rental rate far lower than the rate negotiated in 1963, when the costs of pole maintenance were a fraction of what they are today. As a public utility providing electric service, Respondent expects governmental regulation of rates charged for provision of that service. Respondent objects, however, to the unwarranted intrusion of the federal government into an area far beyond the bounds of traditional regulation. Commission abrogation of a binding contract for the rental of Respondent's pole space for cable television attachments would be such an unwarranted intrusion.

### I. Answers to Allegations in Complaint

1. Respondent is without knowledge or information sufficient to respond to the allegations of paragraph 1 of the complaint.

2. Respondent admits the allegations of paragraph 2 of the complaint.

3. Respondent denies the allegations of paragraph 3 of the complaint.

4. Respondent admits the allegations of paragraph 4 of the complaint, except for the allegation that "[s]uch poles are used for purposes of wire communications." Some of

Respondent's poles are used for wire communications, but many are not.

5. Respondent admits the allegation in paragraph 5 of the complaint that the Florida Supreme Court has held that regulation of pole attachments is outside of the Florida Public Service Commission's current jurisdiction. Respondent is without knowledge or information sufficient to form a belief as to the remainder of paragraph 5.

6. Respondent denies the allegations of paragraph 6 of the complaint. Respondent received a certificate of service listing only Respondent.

7. Respondent admits the allegations of paragraph 7 of the complaint.

8. Respondent admits the allegations of paragraph 8 of the complaint, except for the allegation that "[d]espite Respondent's purported suspension of rights, the terms and conditions of the 1983 agreement appear to have continued governing all other aspects of the relationship between the parties." Pursuant to Section 9.1 of the 1963 agreement, Respondent did not purport to suspend, but did suspend Complainant's rights for default in its obligations. Because Respondent has not taken the further contractual option of terminating the agreement, the agreement continues to apply.

9. Respondent denies the allegations of paragraph 9, except for the allegations that Respondent has been charging Complainant at the rate of $11.47 per pole and Complainant has been paying Respondent at the rate of $5.50 per pole.

10. Respondent admits the allegations of paragraph 10, except for the allegations that Respondent has supplied inadequate data to Complainant and that Respondent has rebuffed Complainant's effort to negotiate. Respondent has supplied detailed data and continues to be willing to negotiate a just and reasonable rate.



11. Respondent denies the allegations of paragraph 11 of the complaint.

12. Respondent denies the allegations of paragraph 12 of the complaint.

13. Respondent denies the allegations of paragraph 13 of the complaint.

14. Respondent denies the allegations of paragraph 14 of the complaint.

15. Respondent denies the allegations of paragraph 15 of the complaint.

16. Respondent denies the allegations of paragraph 16 of the complaint.

17. Respondent denies the allegations of paragraph 17 of the complaint.

**II. Affirmative Defenses**

18. The Commission should not grant the relief requested because:

A. Congress did not grant the Commission authority to amend, modify or abrogate pole attachment contracts in existence prior to the effective date of the Communications Act Amendments of 1978, such as the agreement at issue between Complainant and Respondent.

B. The relief requested would constitute a taking of private property without just compensation prohibited by the Fifth Amendment of the United States Constitution. The well-established legality of governmental regulation of rates charged for Respondent's provision of electric service in no way alters the unconstitutionality of the proposed governmental intrusion upon Respondent's use of private

property for a distinct and heretofore unregulated business purpose.

C. The relief requested would retroactively nullify the terms of a contract in existence prior to the effective date of the Communications Act Amendments of 1978, and thereby would constitute a deprivation of property without due process prohibited by the Fifth Amendment of the United States Constitution.

The legal memorandum attached hereto as Exhibit A further discusses the above defenses.

## III. Calculation of Pole Attachment Rates and Conditions

19. Notwithstanding Respondent's overriding objections to Complainant's request for replacement of the contractual rental rate with a rate determined by the Commission, Respondent has calculated a rate in accordance with the Commission guidelines announced in *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978), 72 F.C.C.2d 59 (1979), 77 F.C.C.2d 187 (1980), and applied in the resolution of certain other pole attachment disputes.

20. Attached hereto as Exhibit B is the affidavit of Matthew R. Noble, Manager for Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Affidavit"). The Affidavit and the following paragraphs focus primarily on the flaws in Complainant's rate calculation methodology.

21. In calculating carrying charges, the complaint derives a tax component of 1.72%, an administrative expense component of .726% and a rate of return of 9.31%. The correct components, respectively, are 7.6%, 1.87%, and



14.6%. Use of these components results in a rate of $2.67 rather than the $1.79 Complainant advocates.[1]

22. In accordance with the methodology approved by the Florida Public Service Commission ("FPSC"), Respondent uses standard levelized fixed charge rate equations to calculate the federal and state income tax component of carrying charges, 7.6%. *See* Affidavit paragraph 16. Complainant would supplant Respondent's customary state-sanctioned tax methodology with a taxes paid methodology in order to derive a component of 1.72%.

23. In *Teleprompter of Fairmont*, the respondent forwarded carrying charges without providing "specific information about its data source or the respective amounts in the various categories." 79 F.C.C.2d at 236. The Commission therefore calculated a rate based on publicly available information, the taxes paid reported on the respondent telephone company's Form M. *Id.* The Commission gave no indication that taxes paid should be used to derive the tax component of carrying charges even where a respondent submits and fully explains a component based on a state-sanctioned methodology.

24. *Cable Information Services, Inc.* v. *Appalachian Power Co.*, 81 F.C.C.2d 383 (1980) ("*C.I.S.*"), the only Commission decision involving a power company's pole attachment rental rates, indicates that the Commission had not intended *Teleprompter of Fairmont* to announce a rigid adherence to a taxes paid methodology. In *C.I.S.*, Appalachian supplied a tax component of 3.47% without any explanation of its derivation, Complaint Attachment B Appendix A. Cable Information Services accepted this figure, Complaint at G, as did the Commission. 81 F.C.C.2d at 389 n.6. While the derivation of the 3.47% figure was

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[1] Both rates rely on December 31, 1980 data. Respondent soon will have available December 31, 1981, data, which more accurately reflects costs at the time the complaint was filed. Respondent will submit this more recent data to the Commission as soon as it becomes available.

never explained or questioned, it appears that this figure reflected a methodology of the kind Respondent advocates. As the Commission noted, *id.* at 387 n.3, Appalachian attempted to modify the tax component it had offered initially on the grounds that the cost of capital had changed. A levelized tax rate—but not a tax component based on actual taxes paid—would change in response to a change in the cost of capital. Appalachian's calculation in another pole attachment proceeding, *Wytheville Tablecable* v. *Appalachian Power Co.*, 48 R.R.2d 684 (Common Car. Bur. 180), supports the inference that the Commission accepted a levelized tax computation in C.I.S.[2] In *Wytheville*, the same Appalachian manager who supplied undocumented figures to Cable Information Services provided figures with explanatory materials to complainant Dublin Associates, Ltd. The tax rate clearly was calculated according to a levelized rate methodology. Dublin Complaint Attachment B Exhibit D.

25. As the Commission has emphasized, *C.I.S.*, 81 F.C.C.2d at 388, citing S. Rep. No. 95-580, 95th Cong. 1st Sess. 20 (1977), Congress intended that the pole attachment program be simple and expeditious and that the Commission defer to cost methodologies sanctioned by state or local regulatory authorities. Complainant's use of actual taxes paid as the basis for calculating the tax component of carrying charges conflicts with both aspects of Congressional intent.

26. Respondent's tax payments, like those of other power companies, fluctuate sharply from year to year. *See* Affidavit paragraph 18. If the Commission sets a rate based on a power company's high taxes paid for one year, affected cable companies will be eager to file new complaints the following year if, as will often be the case, the power

[2] In *C.I.S.*, at 388 n. 4, the Commission similarly used Appalachian's pleadings in another case to make inferences about methodological questions Appalachian had not answered in the case at hand.



company's taxes paid drop significantly. Similarly, it would be in the interest of the Respondent in the instant case to file a complaint against Complainant next year if its taxes paid rise. Far from furthering simplicity and expedition, then, Complainant's method encourages the annual renewal of complaints. Respondent's method would avoid such waste of private and public resources by keeping the tax component on a relatively even keel.

27. By ignoring established state practice, Complainant's method would contravene express Congressional intent:

> "Since the rate-setting formula set forth in S. 1547, as reported, merely establishes a methodology for assigning pole costs, however determined, under applicable accounting procedures, the committee sees no need for the Commission to establish a separate system of accounting to determine operating expenses and capital costs attributable to poles, or to reexamine on its own initiative, the reasonableness of the cost methodology made by the utilities and sanctioned by State or local regulatory agencies."

S. Rep. No. 95-580, *supra*, at 20. By failing to heed the wishes of Congress, Complainant's method would create for Respondent's cable customers a system of tax accounting entirely different from that which applies to Respondent's other customers. There is no rational basis for this dual system of accounting, which would favor cable companies one year and disfavor them the next.

28. As paragraph 17 of the Noble Affidavit demonstrates, Complainant's methodology, in contrast to the FPSC methodology, is internally inconsistent and violative of basic utility ratemaking principles.

29. In *Teleprompter of Fairmont*, 79 F.C.C.2d at 241, the Commission calculated total plant administrative expenses as a percentage of net plant investment and as-

sumed that net pole investment carried the same percentage of administrative expenses. While the complaint, Exhibit D page 2, purports to use total administrative expenses as a numerator, it in fact includes only selected administrative accounts. Calculation of administrative expenses according to the *Teleprompter of Fairmont* method results in an administrative expenses rate of 1.87% rather than the complaint's 0.72%.

30. In selecting only a portion of all plant administrative expenses, the Complainant has omitted a host of administrative expense accounts which relate to poles and should be borne by Complainant just as they are by all other customers. Complainant proceeds to divide its inequitably and erroneously reduced administrative expenses total by total plant investment. It would have been more appropriate to use only that portion of total plant investment corresponding to the administrative expense accounts selected. Here, paradoxically, Complainant departs from its practice of arbitrarily picking and choosing administrative accounts. *See* Noble Affidavit Paragraphs 12-14. The *Teleprompter of Fairmont* approach avoids precisely those pitfalls of data misuse into which Complainant has fallen.

31. For the cost of capital component, the complaint uses the 9.31% return on total capital employed value submitted by Respondent and accepted by the Bureau in *Teleprompter Corp.* v. *Florida Power Corp.*, PA-81-0008 (Released July 16, 1981). In *Teleprompter Corp.* v. *Florida Public Utilities Co.*, 49 R.R.2d 1051, 1052 (1981), the Bureau adopted Florida Public's return on equity authorized by the FPSC, 13.25%, as the cost of capital component in computing the maximum annual pole attachment rental rate. The Bureau thereby rejected a return on total capital employed value supplied by Florida Public in response to Teleprompter's request for information and propounded by Teleprompter as the proper cost of capital value. Complaint at 5, Exhibit B. In *Florida Power and Light*, No. PA-81-0017 (Released July 14, 1981), the Bureau again



rejected a total capital employed value advocated by the complainant cable company in favor of the return on equity—in this case 14%—authorized by the FPSC. Because it was filed months before the Bureau's clarification of the preferred methodology for deriving the cost of capital component, Respondent's submission referred to by Complainant did not advocate the use of the authorized return on equity value. In keeping with the preponderance of recent Bureau decisions, Respondent urges the use of the return on equity value authorized by the FPSC, 14.6%, in the instant case.

32. Complainant adjusts net pole investment by subtracting 15%, representing an estimate of the investment in items not essential to CATV attachments. Respondent finds the subtraction of investment in items not essential to CATV attachments arbitrary and unreasonable. Net pole investment, without subtractions, should be the base figure from which the cable attachment rental rate is derived. Indeed, 47 U.S.C. § 224(d)(1) speaks of costs "attributable to the entire pole," not to the "bare pole." Respondent for the purposes of this calculation deducts 15% from net pole investment in accordance with the Commission determination in *Teleprompter of Fairmont, Inc.* v. *Chesapeake and Potomac Company of West Virginia*, 47 R.R.2d 1407, 1410 (1980), but in no way accepts the validity of this approach.

33. The complaint uses 13.5 feet as the average usable space figure and one foot as the space occupied by CATV. Respondent respectfully submits that in defining "usable space" to include safety spaces between users while allowing attribution of no more than one foot of usable space to CATV users, the Commission has misconstrued Congressional intent and dictated the calculation of pole attachment rates which are neither just nor reasonable. As paragraph 24 of the Affidavit shows, if Complainant owned its own pole system it would incur considerably higher annual costs than it now pays Respondent. Where

more equitable allocation of "usable space" to CATV would result in a finding that Respondent's current rates are just and reasonable, the Commission's interpretation results in the finding that a rate which already provides Complainant a bargain must be drastically reduced. This reduction would come at the expense of utility users. Through its "usable space" decisions, then, the Commission has brushed aside significant countervailing public interests in a single-minded effort to grant CATV companies every conceivable advantage. Respondent therefore urges the Commission to revise its "usable space" policies so that calculations according to the Commission's formula will yield rental rates which are just and reasonable. In the instant dispute, $16.94 is such a rate.

34. If a use ratio of 7.41% is employed to complete a calculation of the rental rate consistent with all of the Commission's interpretations, the resulting annual rental rate per pole is $2.67, as compared to the $1.79 requested by the complaint.

35. An annual rate of $16.94 per pole would be a just and reasonable charge for Complainant's use of Respondent's poles. Respondent has developed this rate by positing the existence of an already-constructed pole system owned by Complainant and multiplying conservative estimates of the net investment per pole and carrying costs that system would require. *See* Affidavit paragraph 24. That Complainant now pays a far lower rate under the terms of the agreement reached with Respondent illustrates the justice of the contractual rate and the injustice of Complainant's request for Commission imposition of a still lower rate. It is only fair and just for Respondent's utility customers to share in the savings Complainant derives from using Respondent's pole system rather than maintaining its own.

**IV. Procedural and Remedial Requests**

36. Respondent requests authority to conduct limited discovery designed to illuminate the likely effects of the



several remedies requested by Complainant. If the Commission determines that Respondent's rates, terms, or conditions are not just and reasonable, Section 1.1410 of the Commission's Rules does not mandate any specific remedy, but rather allows a variety of remedies. The Commission has made liberal use of these remedies in the pole attachment complaints it has decided. *See, e.g., Teleprompter of Fairmont, supra.* Respondent submits that the decision to "[o]rder a refund, or payment, if appropriate," §1.1410(c), for example, should rest on a determination that a furtherance of the Congressional aims underlying Section 224 will result. In adopting 47 U.S.C. § 224, Congress hoped "to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, 95th Cong. 1st Sess. 14 (1977). It is fully possible that some or all of the remedies the Commission could order would serve only to transfer income from the Respondent's utility users to the Complainant without any beneficial effects on cable television service. Respondent hopes to learn more about the role of pole attachment costs in Complainant's business by inspecting records required by Section 76.305 of the Commission's Rules to be available for public inspection. Nonetheless, only discovery will enable Respondent and the Commission to guage [*sic*] accurately the likely public benefits, if any, of the remedies sought by Complainant.

37. If the Commission should decide to modify the rental rates provided for in the contract, then Respondent requests that the Commission serve a copy of any final action in this case upon each local body regulating Complainant's cable activities within the geographical area specified in the complaint. The Commission might thereby increase the possibility that any increased revenue received by Complainant would not merely be profit for Complainant, but might also be passed on to Complainant's customers.

38. As the complaint, paragraph 9, and the Affidavit, paragraph 26, make clear, Complainant has been in violation of the parties' pole attachment agreement for the past two years. Rather than paying a rate calculated according to the terms of the contract, Respondent simply has decided to pay what it wishes. As a result, Complainant now owes Respondent a sum of over $40,000. Should the Commission decide to set a new rate, Respondent submits that any relief ordered should be formulated with this outstanding debt in mind. Under these circumstances, the ordering of a refund, or even the ordering of a new rate, without provision for repayment of the debt would be inequitable.

Respectfully submitted,

FLORIDA POWER CORPORATION

By /s/ ALLAN J. TOPOL (M.S.B.)
Allan J. Topol

/s/ MICHAEL S. BERNSTEIN
Michael S. Bernstein

Covington & Burling
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044

Attorneys for Respondent

*Of Counsel*

Office of the General Counsel
Harry A. Evertz III
Senior Counsel
Florida Power Corporation
P. 0. Box 14042
St. Petersburg, Florida 33733

December 2, 1981



## EXHIBIT A

## LEGAL MEMORANDUM

### I. The Relief Requested Would Abrogate a Contract Existing Prior to the Pole Attachment Act, Thereby Violating the Due Process Clause of the Fifth Amendment of the United States Constitution

While the prohibition of article I of the United States Constitution against laws impairing the obligation of contracts applies on its face only to the states, the due process clause of the fifth amendment "provides essentially the same restraint against federal impairment of the obligation of contracts." *Northwestern National Life Insurance Co.* v. *Jordan*, 447 F. Supp. 856, 859 (D. Nev. 1978). *See Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *Johnson* v. *United States*, 79 F. Supp. 208 (Ct. Cl. 1948); *Miller* v. *Howe Sound Mining Co.*, 77 F. Supp. 540 (E.D. Wash. 1948).

The relief requested suffers from the same defects the Supreme Court found dispositive in ruling a Minnesota statute unconstitutional under the contract clause in its recent landmark decision, *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (statute subjected to a pension funding charge any private employer of 100 employees or more—at least one of whom was a Minnesota resident—who had established a voluntary pension plan qualified under § 401 of the Internal Revenue Code, if he either terminated the plan or closed his Minnesota plant).

The heart of *Allied Structural Steel*'s analysis lies in an evaluation of the nature and purpose of the contested statute in light of several factors the Court found significant in upholding a state mortgage moratorium law in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934): the existence of an emergency, the legislative purpose of protecting a basic societal interest rather than a favored

group, appropriate tailoring of the relief to the emergency, the reasonableness of the imposed conditions, and the legislation's limitation to the duration of the emergency. This evaluation followed an initial consideration of the statute's effects, the Court stating that the severity of contractual impairment determines the care with which the challenged legislation's nature and purpose should be examined. *Allied Structural Steel*, 438 U.S. at 245.

The relief requested would destroy, from the date of the filing of the Complaint, by far the greater part of the value to Respondent of the contractual agreement at issue. Such a severe contractual impairment calls for the kind of careful scrutiny of the Pole Attachment Act, 47 U.S.C. § 224 (Supp. II 1978), as applied, which the Court brought to bear on the pension plan statute in *Allied Structural Steel*.

In *Allied Structural Steel*, the Court noted that the statute "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's." *Id.* at 249. Neither, of course, can the level of the cable pole attachment rental rates and the pace of cable television's progress be likened to the Depression. *Allied Structural Steel* further emphasized that the challenged legislation's duties focused narrowly on a class of private employers, and had not been enacted to protect a general social interest. *Id.* at 247-49. The Pole Attachment Act similarly focuses its burdens on one narrow class, utility companies, while bestowing its benefits on another, cable television companies. In breadth and significance, the societal interest protected by the Pole Attachment pales in comparision not only with the interest protected by the statute upheld in *Blaisdell*, but even with the interest protected by the statute ruled unconstitutional in *Allied Structual Steel*.

The *Allied Structural Steel* court cited yet another flaw in the pension plan statute under the *Blaisdell* standard:



the legislation "did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively." *Id.* at 250. So too would the relief requested severely, permanently, and immediately change the benefits Respondent expected to derive from a negotiated contractual agreement.

Turning from *Blaisdell* to *Veix* v. *Sixth Ward Building & Loan Assn.*, 310 U.S. 32 (1940), *Allied Structural Steel* noted another factor relevant to the consideration of legislation under the contract clause, prior governmental involvement in the area of regulation. *Veix* upheld New Jersey regulation of the requirements for the withdrawal of building and loan association certificates, observing that the state had established statutory requirements for withdrawal for nearly thirty years. As *Allied Structural Steel* recognized, *Veix* rested on the principle that when the petitioner "purchased into an enterprise already regulated *in the particular* to which he now objects, he purchased subject to further legislation upon the same topic." 438 U.S. at 242 n.13 (quoting 310 U.S. at 32) (emphasis added). The *Veix* test in no way supports the constitutionality of Commission abrogation of Respondent's pole attachment contract with Complainant. At the time of the contract's formation, the particular topic involved, cable pole attachment rates, had never been regulated. Rather, as in *Allied Structural Steel*, the legislative body intervened in an unprecedented way. That both cable companies and utilities were regulated in other areas of activity does not cure the constitutional defect in the requested relief. *See Garris* v. *Hanover Insurance Co.*, 630 F.2d 1001 (4th Cir. 1980) (abrogation of insurance company—agent contract not justified because outside the traditional scheme of state insurance industry regulation).

By placing constitutional limits on governmental abridgment of existing contractual relationships, the contract

clause protects the vital societal interest in the reliability of such relationships. As the Supreme Court made clear in *Allied Structural Steel*, those limits exclude from the sphere of permissible governmental activity any impairment of contracts which is not motivated by an emergency, is not careully limited in duration and severity to the imperatives of the problem it is designed to meet, injures a narrow group, protects no broad societal interest, and invades a particular area never before subject to regulation. Because the relief requested suffers from all of these defects, it would violate the contract clause as applied through the due process clause of the fifth amendment.

## II. The Relief Requested Would Violate the Fifth Amendment of the United States Constitution by Taking Respondent's Property Without Just Compensation and by Depriving Respondent of Property Without Due Process of Law

The relief requested would allow the Respondent to charge Complainant no more than $1.79 annually per pole for the use of Respondent's poles, and thereby would injure Respondent's right to rent space on its property at terms it finds satisfactory. This right constitutes "property" for the purpose of the fifth amendment's injunction against taking of private property for public use without just compensation:

> "The term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' . . . It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.' "



*Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 82 n.6 (1980).

In determining whether particular injuries to properties are "takings" under the fifth amendment, the Supreme Court has engaged in essentially "ad hoc, factual inquiries", *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978):

> "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' "

Where the particular circumstances of a case support the conclusion that the challenged governmental action either "does not substantially advance legitimate state intrests . . . or denies an owner economically viable use of his land, . . . " *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), a fifth amendment "taking" has occurred. Under the former test, the government has "taken" property unless its action both responds to the requirements of a substantial public interest and employs means reasonably necessary to the advancement of that interest. *Penn Central*, 438 U.S. at 127 ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594-95 (1962) (" 'To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the pur-

pose, and not unduly oppressive upon individuals' "); *Chatham* v. *Jackson*, 613 F.2d 73, 78 (5th Cir. 1980) ("First, the public's interest must require the regulation. Second, the means must be reasonably necessary to accomplish the goal and not 'unduly oppressive' to individuals."). In *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), for example, the Supreme Court struck down the application of a zoning ordinance to the plaintiff's property as not bearing a substantial relation to the public health, safety, morals, or general welfare.

In reporting the Pole Attachment Act, the U.S. Senate Committee on Commerce, Science, and Transportation cited two purposes: "To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television services to the public." S. Rep. No. 95-580, 95th Cong., 1st Sess. 14 (1977). The relief requested would substantially advance neither the above two purposes nor, indeed, any purpose required by the public interest.

The rates Respondent charges Complainant are fair, just and reasonable. As Paragraph 35 of the Response and Paragraphs 14-15 of the Noble Affidavit show, if the Complainant owned its own already-constructed pole system, the annual cost of upkeep would be $16.94 per pole. The rate Respondent charges Complainant is $5.47 less than the cost the Complainant would incur from the carrying charges of its own system. The rate Respondent has offered Complainant is $1.61 less than the cost Complainant would incur if it shared the carrying charges of its own system with another party.

The relief requested nonetheless would prohibit the current rate, the proposed rate, and all others exceeding 7.41%—a figure derived from the arbitrary assignment of only one foot of pole space to cable use—of Respondent's



costs as unfair and unreasonable. If the public interest requires such intervention, it also must require similar governmental regulation of all other sales and rentals of private property. The existing regulation of rates Respondent charges for the provision of electrical service cannot explain why Complainant—unlike other buyers and renters—requires federal assurance of rock bottom prices at the expense of a private party's property rights. Like the rates Respondent charges in its employee cafeteria, or the rates a wholly unregulated company charges for its services, pole space rental rates have always rested in the property owner's discretion. Constitutional removal of pole attachment rates from Respondent's control requires more than a finding that existing rates, while affording Complainant a bargain, do not afford Complainant all the advantages Respondent's electrical power consumers derive from traditional utility regulations.[1]

The relief requested, then, cannot advance the purpose of preventing unfair pole attachment practices because Respondent's current practices are fair, just, and reasonable. For the same reason, the relief requested cannot advance the purpose of minimizing the effect of unjust pole attachment practices on the development of cable television services. The proposed means for achieving this second purpose suffers from an additional defect: there are no grounds for believing that the transfer of funds requested would spur cable television service. No evidence has been introduced to show that the continuation of Com-

[1] Like the argument based on existing regulation of Respondent's electric rates, arguments based on evidence recorded in the Pole Attachment Act's legislative history fail to explain why the public interest requires giving Complainant, in contrast to other private buyers and renters, the use of private poles at rock bottom prices. The Senate Committee noted evidence that utilities are in a position to extract unreasonably high rates and that the practices of telephone companies present the danger of competitive restraint, S. Rep. No. 95-580, 95th Cong., 1st Sess. 13 (1977), but Respondent does not extract unreasonably high rates and is not a telephone company.

plainant's local cable service depends on the level of pole attachment rates. Indeed, Complainant apparently has operated successfully to date despite—or, more accurately with the aid of—the contractual rates. Similarly, no evidence has been introduced to show that Complainant would use the additional funds to expand cable operations in Florida or elsewhere. Complainant well might distribute these funds as profit, or invest them in enterprises entirely unrelated to cable.

Only one predictable effect will emerge from the mandating of a new rate: an increase in Complainant's funds. Quite apart from the injustice of requiring Respondent to subsidize the growth of cable television, then, the relief requested might aid Complainant without in any way aiding cable or the public interest. This tenuous connection between means and ends in the Pole Attachment Act sharply contrasts with the more carefully tailored governmental actions considered and upheld in previous "takings" cases. *See, e.g., Andrus* v. *Allard*, 444 U.S. 51 (1979) (Eagle Protection Act forbids commerce in eagles after effective date); *Penn Central* (program to preserve historical landmarks restricts development of privately-owned historical landmarks).

The relief requested, in sum, does not serve any public interest, much less substantially advance a purpose required by the public interest. The taking clause of the fifth amendment will not countenance an uncompensated taking serving only to enrich one private party at another's expense.

The defects inhering in the relief requested, as discussed above, in addition violate the fifth amendment by depriving Respondent of property without due process of law. *See generally Pruneyard*, 447 U.S. at 84-85; *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402 (1926).



## III. The Relief Requested Would Abrogate a Pre-existing Contract and thereby Exceed the Scope of Jurisdiction Authorized by the Pole Attachment Act

Neither the Pole Attachment Act nor its legislative history indicate Congressional intent to grant the Commission authority to abrogate contracts in existence prior to the Act's effective date. Respondent respectfully submits that the failure of the Commission, in asserting such authority, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585, 1590-91 (1978), 72 F.C.C.2d 59, 67 (1979), and the D.C. Circuit, in affirming it, *Monongahela Power Co.* v. *FCC*, No. 80-1390, slip op at 607 (D.C. Cir., May 15, 1981) to cite any clear supporting language demonstrates the weakness of the case for Commission jurisdiction. Aside from essentially irrelevant passages in the act and its legislative history, *Pole Attachments* and *Monongahela* forward only the argument that without authority to abrogate existing contracts, the Commission would be powerless to act on its mandate. To the contrary, however, there are many pole attachment agreements which postdate the Pole Attachment Act.

Without evidence of Congressional intent to grant the Commission authority to abrogate existing contracts, such intent cannot be read into the Pole Attachment Act without violating an established principle of statutory construction which allows only prospective application of legislation absent a clear legislative statement to the contrary:

> "[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

*Greene* v. *United States*, 367 U.S. 149, 160 (1964). Those cases narrowly construing even clear Congressional grants

of such authority to administrative agencies further contravene the findings of Congressional intent to authorize abrogation of existing pole attachment contracts in the absence of supporting evidence. *See generally Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

In light of the absence of evidence of Congressional intent to authorize the Commission to abrogate existing contracts, and the rules of statutory construction forbidding Commission exercise of such authority without unequivocal supporting evidence, the relief requested would fall outside of the Commission jurisdiction created by the Pole Attachment Act.



Respectfully submitted,
FLORIDA POWER CORPORATION

By /s/ Allan J. Topol (M.S.B.)
Allan J. Topol

/s/ Michael S. Bernstein
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**Exhibit B**

STATE OF FLORIDA )
COUNTY OF PINELLAS )

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**FILE NO. PA-82-0005**

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**AFFIDAVIT OF MATTHEW R. NOBLE**

BEFORE ME, the undersigned authority, on this day personally appeared Matthew R. Noble, who, after being sworn, deposes and says:

1. My name is Matthew R. Noble. My business address is 3201 34th Street South, St. Petersburg, Florida. I am the Manager for Liason and Joint Use Affairs in the Real Estate Department of the Florida Power Corporation ("Florida Power").

2. I hold a Bachelor's degree in Engineering Technology from the University of South Florida, Tampa, Florida, and an Associate of Science degree in Electronics from St. Petersburg Junior College, St. Petersburg, Florida. I have been employed by Florida Power for the past eight years. My experience in that time has included one year in the area of system planning, four years in the area of scheduling and coordination, and three years in the Real Estate Department. As Manager for Joint Use Affairs, I am responsible for developing appropriate pole attachment charges and negotiating the terms of pole attachment contracts.

3. I have read and am familiar with (a) Sections 1.1401 through 1.1415 of the Rules and Regulations of the Federal Communications Commission, and (b) the Complaint filed by Cox Cablevision Corp. d/b/a Highlands Cable TV ("Cox")



against Florida Power, File No. PA-81-___. In accordance with Section 1.1407(a), I am making this affidavit for filing as a part of the Response of Florida Power to such complaint.

4. I have also read the Response of which this affidavit is a part, and I am familiar with the matters contained therein insofar as the Response concerns the rates, terms and conditions of pole attachment agreements to which Florida Power is a party. The facts set forth in such Response and in this affidavit are true and correct to the best of my knowledge and belief.

5. I have obtained all of the data relating to Florida Power operations in this affidavit from the Florida Power Economic Research Group. This data accurately reflects Florida Power's carrying charges as of December 31, 1980. In light of the filing date of this complaint, the December 31, 1981 data will more accurately reflect the current carrying charges. This December 31, 1981 data will be compiled, calculated and submitted as an amendment to this affidavit.

6. I have calculated two annual pole attachment rates. The first, determined in accordance with relevant Commission *Reports and Orders* and *Memorandum Opinions and Orders*, is $2.67. The second, determined in accordance with the Florida Power conception of a fair and just rate, is $16.94. Paragraphs 7-20 and 23-25 below explain the derivation of the second rate.

7. As of December 31, 1980, Florida Power gross pole investment was $88,975,480, and pole depreciation reserve was $29,327,582. The first figure appeared under account 364 on Florida Power's Annual Report for 1980 to the Federal Energy Regulatory Commission ("FERC Form 1"). Net pole investment, expressed as gross pole investment less pole depreciation reserve, equalled $59,647,898. Subtraction of 15% of net pole investment to account for

investment not essential to CATV results in net bare pole investment of $50,700,713.

8. Florida Power owned 528,655 poles as of December 31, 1981. Net investment per bare pole, expressed as the quotient of net bare pole investment divided by the number of poles owned by the Florida Power Corporation, was $95.91.

$$\frac{\text{Net Bare Pole Investment}}{\text{Number of Poles}} = \$95.91 = \text{Net Investment per bare pole}$$

9. The carrying charge is composed of the cost of capital, maintenance expenses, administrative expenses, depreciation, Federal and state income taxes, and other taxes. All components are reported as of December 31, 1980. All carrying charges are expressed as a percentage of net pole investment. Net pole investment percentages are calculated by multiplying gross pole investment percentages by 1.4917, the ratio of gross pole investment to net pole investment.

$$\frac{\text{Gross Pole Investment}}{\text{Net Pole Investment}} = 1.4917$$

10. The return on equity authorized by the Florida Public Service Commission as of December 31, 1980 was 14.6%.

11. The maintenance expenses component equals the FERC 593 account divided by the corresponding gross pole investment in the FERC 364, 365 and 369 accounts and multiplied by the gross pole/net pole investment conversion ratio.[1] These FERC accounts appear on FERC Form 1 for 1980.

$$\frac{\text{FERC 593 account}}{\text{FERC 364, 365, and 369 accounts}} = \frac{\$\ 10{,}581{,}432}{\$235{,}937{,}450} = 4.48\% = \text{Maintenance expense rate for gross investment}$$

4.48% x 1.4917 = 6.69% = Maintenance expense rate for net investment

[1] This formula conforms to the Common Carrier Bureau's methodology in Teleprompter v. Florida Power Corp., PA-81-0008 (Released July 16, 1981).



12. The Complaint calculates administrative expenses by including only selected accounts. Accounts 924-932—which include outside services employed, property insurance, workmen's compensation, and employee pensions—all relate to pole attachments, yet the Complaint appears to include only accounts 920-923. Fringe benefit costs above salary expenses, and the system liability insurance all poles require, to choose two examples of improperly omitted costs, are essential costs of doing business benefitting all users. If Florida Power did not pay such costs, it could not provide the pole systems that are utilized by the cable companies. Florida Power's other customers absorb all of the administrative costs on their portions of the pole. There is no reason why cable companies should receive preferential treatment.

13. Proceeding on the erroneous assumption that only the administrative expenses in the Complaint relate to poles, the next step logically would be to divide the resulting administrative expenses figure by a plant investment figure correspondingly lessened by the exclusion of categories of investment unrelated to poles. But no such balancing is possible, since the expense accounts the Complaint selects do not relate to any particular part of plant.

14. An administrative expense value including all expenses related to poles, 1.87%, should be used:

$$\frac{\text{Total administrative expenses}}{\text{Gross plant investment}} = \frac{\$29,943,156}{\$2,078,396,138}$$

= Administrative expense rate for gross investment

1.44% x 1.297 = 1.87% = Administrative expense rate for net investment

15. The depreciation rate is calculated for straightline depreciation as the quotient of 1 minus salvage value divided by the average life of 22 years authorized by FERC account 364 by the Florida Public Service Commission.

$$\frac{1 - \text{salvage value}}{22} = \text{Depreciation rate for gross investment}$$

$$\frac{1 - 0}{22} = 4.55\%$$

4.55% x Ratio = Depreciation rate for net investment

4.55% x 1.4917 = 6.79%

16. The federal and state income tax component equals the income tax paid on the equity portion of the return on investment. The income tax includes the levelized effect of both current and deferred taxes as required under full normalization accounting. The calculation of income taxes below is consistent with the Florida Public Service Commission method and uses standard levelized fixed charge rate equations for income tax.

Federal and state income tax rate = .487

Debt/equity ratio - .4703

Composite cost of debt = 8.79

Composite cost of capital = 9.31

A/P = capital recovery

Average life = 22

Depreciation rate for gross investment = 4.55%



$$\text{Income Tax} = \frac{(487)}{(1 - .487)} \quad \frac{(1 - (.4703)(8.79)}{(\quad 9.31 \quad)} \quad \frac{(\text{A/P, } 9.31\%, \text{ 22 yrs.})}{(\quad -.0455 \quad)}$$

Income Tax = 3.32% = Income tax rate for gross investment

3.32% x 1.4917 = 4.95% = Income tax rate for net investment

17. The Complaint's use of current taxes paid to develop the tax component of carrying charges is both self-contradictory and contrary to sound utility rate making principles.[2] In 1980, Florida Power recorded -$27 million in federal income taxes. A utility incurs negative income taxes only when it loses money in an accounting sense. By relying on negative income taxes to calculate the tax portion of the carrying charge rate, the Complaint assumes that the pole will have a negative rate of return, *i.e.*, will lose money based on the revenues provided by the Florida Public Service Commission. This assumption conflicts both with the Complaint's acceptance of a positive rate of return in computing carrying charges and with the basic concept of utility regulation. The utility concept accepts an obligation to provide a "fair" rate of return after Federal and State income taxes. The federal government must receive its portion of the fair return—a positive dollar amount—in taxes. Those taxes are borne as a rate payer expense. If there are no taxes owed on the investment return, it is only because there was no return on the investment. If the return is negative, then the utility eventually fails, or some other entity must subsidize the negative return.

18. Florida Power's federal taxes taken from year-end operating reports in the recent past have varied substantially from year to year:

| | |
|---|---|
| 1980 | (-$ 26,867,971) |
| 1979 | $ 21,650,417 |

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[2] While this discussion focuses on federal taxes, it applies with equal force to state taxes.

| | |
|---|---|
| 1978 | $ 48,102,838 |
| 1977 | $ 34,275,762 |
| 1976 | (-$ 7,334,472) |
| 1975 | $ 8,144,000 |

Had the complaint substituted 1978 federal taxes in its calculation, the tax component nearly would have qradrupled. Such reliance on taxes *at any one point in time* does not comport with the long term goal of rate making. The tax component should reflect the amount of federal and state taxes *that will be paid on the granted return portion of the fixed charge rate.* If a utility is granted a positive return on an investment, then it will have positive earnings from that investment which will result in a *positive* federal income tax. The methodology employed by Florida Power and approved by the Florida Public Service Commission follows this proper and widely accepted utility rate making philosophy.

19. The calculation of "other" taxes for net investment begins with the "other" tax total, comprised largely of property taxes and gross receipts taxes, which was reported on account 408.10 of the FERC Form 1 for 1980. That figure, less franchise fees, is then divided by the gross plant investment figure which was reported on the same FERC Form and multiplied by the more specific gross pole/net pole investment conversion ratio.

Other taxes (except for franchise fees)

Gross Plant Investment = $\frac{\$36,940,257}{\$2,078,396,138}$ = 1.78% = Other rate for gross investment

78% x 1.4917 = 2.65% = Other tax rate for net investment



20. Total carrying charges, 37.55%, equal the sum of the individual components derived above in paragraphs 10-19:

| | % of Net Pole Cost |
|---|---|
| Return (Cost of Capital) | 14.6 |
| Maintenance Expense | 6.69 |
| Administrative Expenses | 1.87 |
| Depreciation | 6.79 |
| Federal & State Income Taxes | 4.95 |
| Other Taxes | 2.65 |
| Total | 37.55 |

21. The annual revenue requirement per pole is derived by multiplying the net investment per pole figure in paragraph 8 by the carrying charges percentage in paragraph 20.

$95.91 x 37.55% = $36.01 = Annual revenue requirement per pole

22. If the annual revenue requirement per pole were to be multiplied by 7.41%, the annual pole attachment rental rate would be $2.67.

23. The present pole attachment rate, $11.47, was instituted by Florida Power pursuant to that section (8.1) of the contract between the parties which governs rates when the parties fail to agree on a rate revision. Both that rate, and the rate of $6.86 offered to Cox by Florida Power during negotiations, are fair and just. They are much lower than the annual pole cost Cox would incur if it owned its own already-constructed pole system.

24. An annual rental rate of $16.94 per pole would be fair and just. It is reasonable to assume that a cable company-owned pole system would resemble closely a telephone-owned pole system, since both only require poles of minimal height. *Teleprompter Corporation* v. *General Tele-*

*phone Company of Florida*, No. PA-81-0021 (Released July 8 1981), found a General Telephone Company of Florida net investment per pole of $45.12. The carrying costs for telephone pole systems generally exceed those for the Florida Power system. Accordingly, a conservative estimate of the carrying cost percentage for a cable company-owned system equals the figure derived for Florida Power herein. Multiplying net investment per pole by carrying costs yields an annual pole cost for a cable company-owned system of $16.94.

$45.12 x 37.55% = $16.94

25. If Cox were to share equally the costs of its pole system with another user, the annual cost for each party would be $8.47, still well above the rate Florida Power has offered to Cox. Florida Power, far from abusing its bargaining power, charges Cox much less than Cox would pay annually for its own system.

26. Since 1979, Cox has failed to pay Florida Power according to the terms of the parties' contractual agreement. As a result of this contractual violation, Cox now owes Florida Power $40,738.73, not including interest.

27. All CATV rental payments are deposited in a general fund which helps to reduce the overall rate base paid by the utility customer. To require Florida Power to lower its pole rental rates, therefore, would increase the already substantial savings to CATV companies at the expense of utility customers.

Signed this 30th day of November, 1981.

/s/ MATTHEW R. NOBLE
MATTHEW R. NOBLE

Sworn to and subscribed before
me this 30th day of November, 1981.

/s/ PAUL R. MORIN
Notary Public

My Commission Expires:
November 25, 1984



## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1981, copies of the foregoing "Response" have been mailed, postage prepaid to:

Charles H. Helein
Dow, Lohnes & Albertson
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Complainant

Florida Public Service Commission
Commission Clerk
101 East Gaines Street
Tallahassee, Florida 32301

Federal Energy Regulatory Commission
825 North Capitol Street, N.W.
Washington, D.C. 20426

/s/ Michael S. Bernstein
Michael S. Bernstein

December 2, 1981